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NUMBER 574

In the Supreme Court of the United States

OCTOBER TERM, 1944

**THE STATE OF ALABAMA AND PUBLIC SERVICE COMMISSION,
THE STATE OF TENNESSEE AND THE RAILROAD AND PUBLIC
UTILITIES COMMISSION OF THE STATE OF TEN-
NESSEE, COMMONWEALTH OF KENTUCKY AND
RAILROAD COMMISSION OF KENTUCKY,
APPELLANTS**

vs.

**THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION AND FRED M. VINSON, ECONOMIC STABIL-
IZATION DIRECTOR, BY CHESTER BOWLES, PRICE
ADMINISTRATOR, ET AL., APPELLEES**

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF KENTUCKY**

**BRIEF ON BEHALF OF THE APPELLANTS, STATE OF TENNES-
SEE AND THE RAILROAD AND PUBLIC UTILITIES
COMMISSION OF THE STATE OF TENNESSEE**

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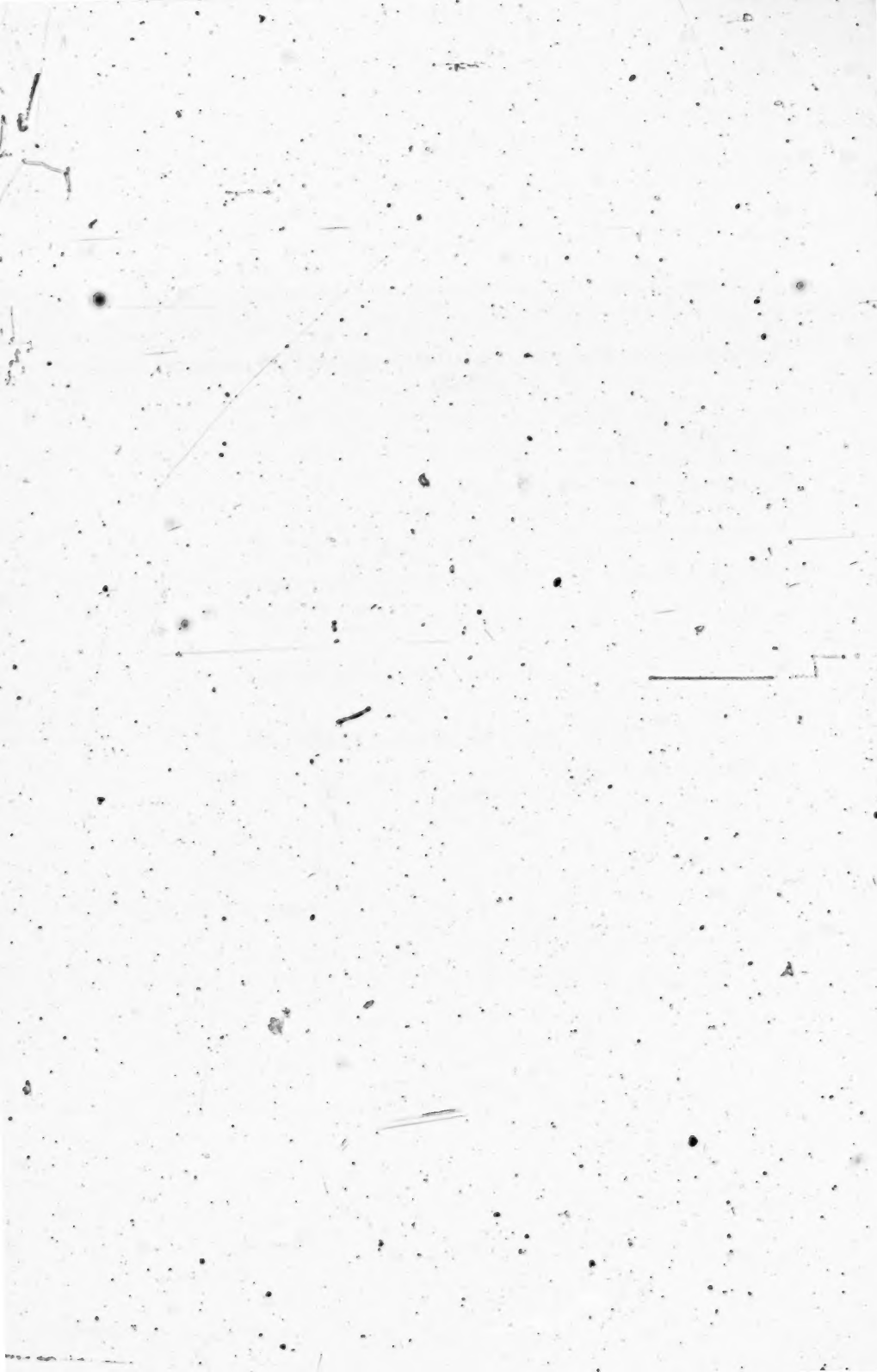
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OPINIONS BELOW

The opinion of the Three-Judge United States District Court for the Western District of Kentucky (R. 1345-1362), which is here under review, is reported in 56 F. Supp. 478. The report of the Interstate Commerce Commission, under the style of *Alabama Intrastate Fares* is reported in 258 I. C. C. 133 (R. 4). The case of *Tennessee Intrastate Fares*

is treated of by the Interstate Commerce Commission in the same report, and disposed of therein.

JURISDICTION

The jurisdiction of this Court is invoked under the United States Code, Title 28, Sections 43 and 45-48, inclusive, and particularly Section 47a. (Act of March 3, 1911, Chapter 231, Section 210, 36 Statutes, 1150; October 22, 1913, Chapter 32, 38 Statutes 220.)

The decree of the United States District Court for the Western District of Kentucky was entered on August 3, 1944 (R. 1362). A petition for appeal to this Court was presented to the District Court and was allowed September 1, 1944 (R. 1373). The record of the District Court was forwarded to this Court on September 25, 1944, and the case was filed October 9, 1944. Probable jurisdiction was noted by this Court on November 13, 1944, at which time this Court also noted probable jurisdiction in No. 592, *Vinson et al. vs. United States et al.*, which relates to the same opinion and decree of the Court below. (R. 1393-1394.)

QUESTION PRESENTED

Whether the action of the Interstate Commerce Commission in requiring the railroads operating within the states of Alabama, Tennessee, and Kentucky to increase the intrastate coach fares in said states, contravenes the Tenth Amendment of the Constitution of the United States, inasmuch as the finding of said Commission that the intrastate fares imposed by authority of the respective states have

caused or will cause an undue, unreasonable or unjust discrimination against interstate or foreign commerce is not sustained by the evidence of record, there being no evidence of any burden upon interstate commerce nor any finding of the Commission of the amount of additional revenues from intrastate rates required to enable the carriers to adequately and sufficiently meet the nation's transportation needs.

STATUTES INVOLVED

The following sections of the Interstate Commerce Act are set forth in Appendix A, *infra*, pages 91 to 92:

Section 13 (4) of the Interstate Commerce Act, United States Code, Title 49.

Section 15a (2) of the Interstate Commerce Act, United States Code, Title 49.

STATEMENT OF THE CASE THE PLEADINGS SUBSTANCE OF THE COMPLAINT

The State of Tennessee and the Railroad and Public Utilities Commission of the State of Tennessee on the tenth day of June, 1944, filed complaint in the District Court of the United States for the Western District of Kentucky under the Urgent Deficiencies Act (28 U. S. Code 43-48) to enjoin and set aside an order of the Interstate Commerce Commission entered May 8, 1944, and corrected May 24, 1944, under the terms of which railroads serving the State of Tennessee, and three other states—viz.: Alabama, Kentucky, and North Carolina—were required to establish and maintain intrastate passen-

ger fares on a basis not lower than the interstate fares for like service, and recited in substance the following:

1. That the State of Tennessee is one of the sovereign states of the United States and the Railroad and Public Utilities Commission has general jurisdiction over the rates and fares charged by rail carriers engaged in intrastate commerce in the State of Tennessee. (R. 1.)

2. That the United States is made a party defendant under the provisions of the Urgent Deficiencies Act aforesaid and because the Interstate Commerce Commission claims to have derived its authority for the unconstitutional and illegal acts committed by it from the United States; that the Interstate Commerce Commission is a regulatory body having jurisdiction over rail carriers engaged in interstate commerce, and jurisdiction under strictly defined constitutional and statutory limitation over rail carriers engaged in intrastate commerce. (R. 2.)

3. That the Interstate Commerce Commission on October 13, 1944, instituted an investigation known as Docket No. 29037, *Tennessee Intrastate Fares*, to determine whether Tennessee intrastate passenger fares constitute any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce. (R. 2-3.)

4. That said investigation was instituted pursuant to a petition filed with the Interstate Com-

merce Commission by sixteen railroads operating within the State of Tennessee, charging violation of Sections 3 and 13, Title 49 of the United States Code, known as the Interstate Commerce Act, upon which hearing was held by the Interstate Commerce Commission on December 2-3, 1943, and the matter was argued before the Interstate Commerce Commission in Washington, D. C., on February 18, 1944. (R. 3.)

5. That while all railroads operating in Tennessee filed the petition on which the investigation was instituted the proceedings were primarily and almost exclusively for the use and advantage of the four major railroads, these being the Nashville, Chattanooga and St. Louis Railway; Louisville and Nashville Railroad Company; Southern Railway Company; and the Cincinnati, New Orleans and Texas Pacific Railway Company; which four carriers would receive 99.38 per cent of the aggregate increase in passenger revenues to be derived by all Tennessee carriers if the increases permitted by the Interstate Commerce Commission are allowed. (R. 3-5.)

6. That the Interstate Commerce Commission published its findings and conclusions on March 25, 1944, upon which the Railroad and Public Utilities Commission filed a petition for rehearing and reconsideration, which petition being denied, final order was entered in the case dated May 8, 1944, in which final order the Interstate Commerce Commission set aside and declared null and void the existing fares for transportation of coach passengers in intrastate commerce prescribed by the Railroad and Public Utilities Commission of the

State of Tennessee to be charged by railroads operating within the State of Tennessee. (R. 5.)

7. Prior to the proceedings before the Interstate Commerce Commission the carriers had filed tariffs with the Railroad and Public Utilities Commission of the State of Tennessee, increasing the rates for intrastate coach passengers in Tennessee, which tariffs had been suspended and a full hearing conducted by the Commission, on the completion of which the Tennessee Commission on August 30, 1943, entered its findings and order that the carriers had presented no evidence which would justify the increases sought by them and the existing fares should be maintained as just and reasonable. (R. 6.)

8. That the action there taken by the Railroad and Public Utilities Commission was in conformity to the Price Stabilization Program embodied in the Emergency Price Control Act of 1942 (Public Law 421, Seventy-Seventh Congress), and the Act of October 2, 1942 (Public Law 729, Seventy-Seventh Congress), and in obedience and according to Executive Orders of the President of the United States, Number 9250, dated October 3, 1942, and Number 9328, dated April 8, 1943. (R. 6-7.)

9. That the effect of the order of the Interstate Commerce Commission is to raise passenger coach fares between Tennessee intrastate points from 1.65 cents per mile one way to 2.2 cents per mile one way and from 1.485 cents per mile round trip to 1.98 cents per mile round trip, thus increasing the fares prescribed by the Tennessee Commission by 33 1/3 per cent and requiring intrastate passengers to pay \$550,000 per annum in the aggregate in increased cost of transportation. Before February

10, 1942, interstate and intrastate fares were 1.5 cents per mile one way and 1.35 cents round trip, but on that date these fares were increased 10 per cent pursuant to action of the Interstate Commerce Commission in Ex Parte 148, *Increased Railway Rates, Fares, and Charges*, 1942, 248 I. C. C. 545, and at the same time a 10 per cent increase in intrastate fares was permitted by the Tennessee Commission. On October 1, 1942, the Interstate Commerce Commission increased interstate fares in the southern states to 2.2 cents per mile one way and 1.98 cents per mile round trip. (R. 7-8.)

10. That the order of the Interstate Commerce Commission dated May 8, 1944, exceeds the powers granted to the Federal Government in the Commerce Clause, Article 1, Section 8, of the Constitution of the United States and constitutes an unwarranted and wholly unjustified invasion of the sovereignty of the State of Tennessee in violation of the Fifth and Tenth Amendments of the Constitution of the United States, there being no facts before the Commission justifying its report, findings, and order. (R. 8.)

11. That the finding of the Commission that a basic interstate coach fare of 2 cents per mile plus an additional 10 per cent is reasonable is not supported by the evidence; that in the hearing held by the Commission in Docket No. 29037 the Commission received no evidence purporting to show that the interstate coach fare of 2.2 cents per mile has been found by the Commission to be a reasonable fare in interstate commerce; that in Docket No. 26550, *Passenger Fares and Surcharges*, 214 I. C. C. 174, the Commission determined that basic inter-

state coach fares of 1.5 cents per mile in the southern region were not unreasonable or otherwise unlawful for application throughout the South; that on July 14, 1942, the southern railroads filed petition in said Docket No. 26550, seeking authority to increase southern coach fares to 2.2 cents per mile, which petition was denied by the Interstate Commerce Commission on August 1, 1942, but at the same time the Commission authorized southern carriers by modification of the former orders in Ex Parte 148 to apply the increase of 10 per cent approved in said order to the basic fare of 2 cents per mile for the said southern carriers. In the petition filed in Ex Parte 148 no relief was prayed by the carriers for an increase from 1.5 cents to 2.2 cents per mile, the only relief prayed for being for a uniform increase of 10 per cent in all fares, as a result of which the increase of fares in the South to 2.2 cents per mile is illegal, null and void. (R. 9-11.)

12. That the finding of the Commission to the effect that the interstate fares are reasonable was made without due process of law, inasmuch as the Interstate Commerce Commission in modifying its original order in Ex Parte 148 so as to permit southern carriers to apply the 10 per cent increase there granted to a basic fare of 2 cents per mile, thus allowing a 46.66 per cent increase instead of a 10 per cent increase was in violation of the cooperative agreement between the Interstate Commerce Commission and the several state commissions; said procedure was made without pleadings on the part of the carriers, without proof to support same, and with no opportunity on the part of the protesting parties

to resist, whence the order is illegal and erroneous and made without due process of law. (R. 11-12.)

13. That the finding of the Interstate Commerce Commission that the conditions affecting transportation of coach passengers within Tennessee intrastate are substantially similar to those interstate is directly contrary to the evidence, which undisputedly shows that there is a substantial difference in the service accorded interstate passengers and that accorded intrastate passengers within the State of Tennessee, the intrastate service on the average being distinctly inferior to the interstate service. (R. 12.)

14. That the specific findings of the Commission that interstate passengers and intrastate passengers travel in the same trains and in the same cars, but that interstate passengers are required to pay higher fares than intrastate passengers to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable prejudice of the interstate passengers is wholly at variance with the facts of record; the undisputed record shows that all trains operated by respondents in Tennessee are not available to interstate and intrastate passengers alike and that the de luxe trains, having the highest grade of service and facilities, make only one stop within the state and carry only interstate passengers; that there is also no evidence in the record that the difference in interstate and intrastate fares constitutes a source of undue disadvantage to any one person or of undue advantage to any other person; and that the railroads are not seeking relief for particular persons or places, but on the contrary seek and were granted by the Com-

mission an order of state-wide application. (R. 13-15.)

15. That the finding of the Commission that revenues of the carriers under the intrastate fares are less by \$525,000 than they would be if those fares were increased to the level of the interstate fares, and that the traffic moving under the intrastate fares does not contribute its fair share of the revenues required to enable the carriers to render adequate and efficient service is unsupported by the evidence of record; that the evidence in the record is that traffic moving under intrastate fares in Tennessee does contribute its fair share of the revenues required to enable the carriers to render adequate and efficient service; that for the year ending September 30, 1943, the four railway companies which benefit from the order of the Commission increasing their fares earned at a rate of return (before federal income taxes) ranging from a low of 12.4 to a high of 17.2 per cent; that the carriers in 1943 earned in excess of a fair return; that their present earnings are at even higher levels; and that they do not need the revenues from the increase of intrastate fares to enable them to earn a fair return; that per car earnings for 1942 and 1943 reflect a large increase over those of prior years, so that the record in this case clearly proves that the revenues required by Tennessee carriers to defray the expense of rendering adequate and efficient transportation service is presently 1.22 cents or less per passenger mile for coach passengers as compared with the intrastate fare of 1.65 cents per mile. (R. 15-18.)

16. That the finding of the Commission to the

effect that the maintenance of lower intrastate fares in Tennessee than the corresponding interstate fares causes undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce is an erroneous finding inasmuch as there is no evidence in the record to support same. (R. 18-19.)

17. That the Interstate Commerce Commission erred in its failure to make proper findings relative to the Wartime Stabilization Program and to give proper effect to the policy set forth in the Emergency Price Control Act of 1942, 50 U. S. C. A. App. 901, and the Stabilization Act of October 2, 1942, 50 U. S. C. A. App. 961 et seq.; and to Executive Order No. 9328 of the President of the United States; that the Railroad and Public Utilities Commission of the State of Tennessee was obedient to the statutes enacted and to the order of the President in refusing to allow intrastate increases in coach fares, in the absence of any showing by the railroads that there was a necessity for such an adjustment. (R. 19-20.)

18. That the findings of the Interstate Commerce Commission are erroneous inasmuch as they fail to reflect that the record shows undisputably that Tennessee railroads are earning excess profits in contravention of the legislative pronouncement of national policy embodied in the Excess Profits Tax Act of 1942; that the record indicates that the excess profits derived by the existence of a state of war by

the Tennessee railroads amounts to more than \$30,000,000 annually. (R. 20-21.)

19. That the Interstate Commerce Commission erred in basing its increase of intrastate fares upon the showing made in the record that the movement of troop trains had increased the cost of transportation; the record undisputedly shows that all movement of troop trains is interstate in nature and such increases in the cost of interstate traffic do not properly support a finding that intrastate travel fails to produce its fair share of the earnings required by the carriers to enable them to provide adequate service. (R. 21-24.)

20. That the finding of the Interstate Commerce Commission that the Tennessee intrastate fares are lower than the corresponding interstate coach fares in the southern region is inadequate and insufficient in and of itself to support the order of the Commission, as the mere existence of a disparity between fares does not justify the Commission in finding that a discrimination exists. (R. 24.)

21. That if the order of the Interstate Commerce Commission is allowed to remain in effect the lawful powers of the State of Tennessee, reserved to it under the Tenth Amendment of the Constitution of the United States, will be destroyed, nullified and subverted, and likewise coach passengers will suffer irreparable loss and damage inasmuch as they would have no adequate means of recovering from the Tennessee railroads the increases in transportation charges, amounting to more than \$550,000 annually. (R. 24-25.)

22. The foregoing averments were followed by appropriate prayers for injunctive relief restraining

and inhibiting the United States and the Interstate Commerce Commission from enforcing and executing said order of the Commission. (R. 25-26.)

SUBSTANCE OF THE ANSWER OF THE UNITED STATES

On July 7, 1944, the defendant United States filed answer to the complaint, in substance, as follows:

Inasmuch as Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, seeks to intervene as plaintiff and the Interstate Commerce Commission is a party defendant in these proceedings, and a situation is presented in which two government agencies on opposite sides of the proceedings will have an opportunity through their respective counsel to present their position, the United States has determined to remain neutral in the proceedings in the District Court without prejudice to any position which it may desire to take on appeal.

The United States neither admits nor denies the allegations of the complaint. (R. 420-421.)

SUBSTANCE OF THE ANSWER OF THE INTERSTATE COMMERCE COMMISSION

On July 10, 1944, the Interstate Commerce Commission filed its answer to the complaint, in substance, as follows:

1. The Commission admits Court jurisdiction of the action and the parties. (R. 422.)
2. The Commission admits that the plaintiffs have a legal right to maintain the action and that intervenors are proper parties. (R. 422.)

3. The Commission alleges that proceedings were instituted by it upon the filing of petition in July, 1943, by the various Tennessee rail carriers, which petition complains that intrastate coach passenger fares within the State of Tennessee were unduly preferential of intrastate passengers and unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce in violation of Section 13 (3) and (4) of the Interstate Commerce Act, and seeking to have such preference, prejudice or discrimination removed; that said petitions were docketed under Docket No. 29037 and hearings were held thereon, briefs were filed and arguments were heard by the Commission as to all matters involved in said proceedings, and the Commission entered its report of March 25, 1944; thereafter petition was filed for reargument and reconsideration of the report which petition was denied; thereafter rail carriers were ordered to establish passenger fares for intrastate transportation in Tennessee and also in the states of Alabama, North Carolina, and Kentucky, on a basis no lower than the passenger fares presently applicable interstate. The report of the Commission of March 25, 1944, is published in 258 I. C. C. 133 and recites the history of rail fares in Southern Passenger Association territory, and the former decisions and orders of the Commission relative thereto; prior to June 10, 1918, passenger fares were 2.5 cents per mile, and on said date the fare was raised to 3 cents per mile which remained in effect until August 25, 1920, when fares generally were raised to 3.6 cents per mile; during 1932 and 1933 certain southern rail carriers experimented with lower fares, establishing fares of 1.5

cents per mile; on February 28, 1936, the Commission concluded its investigation of passenger fares and in its report in *Passenger Fares and Surcharges*, 214 I. C. C. 174, prescribed maximum reasonable fares of 2 cents per mile, one way and round trip in coaches, throughout the country and found that the existing experimental fares of 1.5 cents per mile in southern territory were not unreasonable or otherwise unlawful; on November 15, 1935, the carriers maintaining the 1.5 cents per mile fares increased these fares to 2 cents per mile, but restored the 1.5-cent fare on January 15, 1939, with certain other southern lines continuing to maintain the 2-cent fare basis. In *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the Commission on petition of the carriers authorized a 10 per cent increase in passenger fares; under said order the passenger coach fares of 1.5 cents per mile in the South became 1.65 cents, and fares of 2 cents became 2.2 cents, with round-trip fares modified accordingly; on August 1, 1942, on petition of southern rail carriers the Commission authorized them to increase the lower interstate passenger fares in coaches to 2.2 cents per mile to become effective October 1, 1942; several southern states approved similar increases for intrastate application, but the regulatory Commissions of Alabama, North Carolina, Tennessee, and Kentucky declined to authorize such increases; the refusal of these four states to authorize increases was the basis of the petition of southern rail carriers in the instant proceedings asking that the disparity between interstate and intrastate fares be removed. The report of the Commission was based upon the following findings, in substance, as

follows: (1) that the interstate fares are reasonable, (2) that the intrastate fares complained of are more than the corresponding interstate fares, (3) that conditions affecting the transportation of coach passengers intrastate are similar to those interstate, (4) that interstate passengers' travel in the same trains and cars with intrastate passengers, but pay higher fares to the undue and unreasonable advantage and preference of intrastate passengers, and undue and unreasonable disadvantage and prejudice of interstate passengers, (5) that Tennessee rail carriers' revenues are less by \$525,000 annually than they would be if the intrastate fares were increased to the interstate level, and that traffic moving under the lower intrastate fares is not contributing its fair share of revenues required to enable the railroads to render adequate and efficient transportation service, and (6) that the maintenance of the lower intrastate fares causes unreasonable advantage and preference to intrastate passengers, undue and unreasonable advantage and prejudice against interstate passengers, and undue, unreasonable, and unjust discrimination against interstate commerce. (R. 422-427.) (Full text of said findings is set out in Appendix B hereafter, pages 93 to 95.)

4. The Commission alleges that the findings in said report are supported and justified by the evidence and that the Commission considered all facts, circumstances, and conditions called to its attention by the respective parties; that the report was not made arbitrarily or unjustly or without proof or contrary to the relevant evidence, nor did the Commission exceed the authority conferred upon it by

law; the Commission expressly denies the truth of all allegations in conflict with the allegations of the answer or with the findings in said report dated March 25, 1944. (R. 427.)

5. The Commission specifically denies the allegations of the complaint as follows: Of paragraph XII to the effect that the Commission disregarded the cooperative procedure agreed upon by and between the Federal Commission and the State Commissions; of paragraph XIX to the effect that the Interstate Commerce Commission based its action upon the added expense of operation of the railroads due to their movement of troop trains, all of which, is interstate in nature, so that such increases in cost of interstate traffic should not properly be used to support a finding that intrastate traffic does not produce its fair share of the earnings required by the railroads to enable them to provide adequate and efficient service; of paragraph XX, the allegation that the findings of a disparity between intrastate and interstate coach fares is inadequate in and of itself alone to sustain the order of the Commission; and of paragraph XXI, the allegation that the power of the State of Tennessee to regulate the rates for intrastate transportation of passengers is destroyed, nullified and subverted, in contravention of the Tenth Amendment to the Constitution of the United States, by the order of the Commission. (R. 427.)

**SUBSTANCE OF THE ANSWER OF TENNESSEE
RAILROADS, INTERVENING DEFENDANTS**

On July 12, 1944, the Tennessee railroads filed their answer, in substance, as follows:

1. The defendants adopt and rely upon the answer of the Interstate Commerce Commission. (R. 428.)

2. These defendants specifically deny the averments in paragraphs X to XXI, inclusive, of the complaint, all of which paragraphs have to do with specific averments as to the inadequacy of the findings and evidence before the Interstate Commerce Commission in the issuance of its report. (R. 428.)

THE IMPORTANT EVIDENCE

1. *Tennessee carriers petition I. C. C. to remove discrimination in intrastate coach fares:* By a petition in the nature of a complaint, bearing date of September 8, 1943, the railroads operating in Tennessee sought an order from the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act to declare certain rates prescribed by the Railroad and Public Utilities Commission of the State of Tennessee for the intrastate transportation of passengers within the State of Tennessee discriminatory, prejudicial, unjust, and unlawful and as creating an undue burden upon interstate commerce; and to remove such alleged advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, as may exist by reason of such rates prescribed by said Tennessee Commission. The principal rates which are challenged by this proceeding are those for the intrastate transportation of coach passengers which are charged 1.65 cents per mile, as compared with the fare of 2.2 cents per mile in interstate commerce. (R. 433-439.)

2. *Coach fares established at 1.5 cents per mile:* Prior to October 1, 1942, the interstate coach fare was 1.65 cents. The basic coach fare of 1.5 cents per mile in the South was approved by the Commission on February 28, 1936, in its decision in Docket Number 26550, *Passenger Fares and Surcharges*, 214 I. C. C. 174. A 10 per cent increase, bringing the fare to 1.65 cents per mile, was published by the carriers under authority of an order of the Interstate Commerce Commission dated January 21, 1942, confirmed by the decision in Ex Parte 148, *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545. The Tennessee intrastate fare was increased to the 1.65-cent level on or about February 10, 1942. (R. 71-72.)

3. *Increase of interstate fares to 2.2 cents per mile:* The railroads in Southern Passenger Association territory on July 14, 1942, filed petition praying modification of the order in Docket No. 26550, seeking authority to increase southern coach fares to 2.2 cents per mile. By order dated August 1, 1942, the Commission stated that the petition was denied; but in fact granted the prayer of the petition by issuance of an order in Ex Parte 148, modifying the former order in Ex Parte 148 so as to authorize southern carriers "to apply the increase of 10 per cent approved in said order to a basic fare of 2 cents per mile on the lines of said petitioners." The southern carriers increased the fares to 2.2 cents per mile effective October 1, 1942. (R. 982-983.)

4. *Tennessee Commission refuses intrastate increase to 2.2 cents:* On or about October 12, 1942, the Tennessee railroads petitioned the Tennessee Rail-

road and Public Utilities Commission for authority to increase intrastate coach fares to the interstate level. By its order of August 30, 1943, the Tennessee Commission in Docket No. 2535 issued its report and interlocutory order, in which it declined to authorize the proposed increase in coach fares. (R. 49; 439.)

In its decision the Tennessee Commission exercised the sovereign power of that State, delegated to it by the legislature of the State, in determining that the proposed rates will be unreasonable for intrastate application. The action of the Tennessee Commission has not been appealed for review to any of the courts of that State having jurisdiction to review orders of the Commission.

5. *Possible evasion of interstate fares:* In order to establish the existence of discrimination against interstate passengers, the carriers introduced exhibits designed to show possible evasion of interstate fares by purchase of intrastate tickets to the nearest state-line station, and rebuying or paying cash fares on trains to interstate destinations. As an example, it would be possible for a passenger to travel from Nashville, Tennessee, to Woodland Mills, Tennessee, on an intrastate ticket and purchase an interstate ticket from Woodland Mills, Tennessee, to Hickman, Kentucky. The through interstate fare from Nashville, Tennessee, to Hickman, Kentucky, is \$3.78, whereas the combined fares on the Nashville to Woodland Mills combination would be \$2.91, and the reduction in interstate fare would be 87 cents. No evidence was introduced that any such evasion had actually taken place and no particular instance

of such evasion was cited. (R. 91; 333; 337; 210; 358-359.)

Evidence was also introduced proving the obvious fact that for travel over like distances, the higher interstate fares result in greater charges than do the lower intrastate fares. (R. 91; 335-336; 338; 210; 360.)

6. *Lack of evidence of undue preference to persons or localities in intrastate commerce or undue prejudice to persons or localities in interstate commerce:* No evidence was introduced that any persons or localities had complained that the Tennessee intrastate fares caused them any undue prejudice or disadvantage. No evidence was introduced that any persons or localities in interstate commerce had sustained any economic injury or injury of any sort by the charging of any Tennessee intrastate fare. (R. 186.)

7. *Evidence that service conditions in intrastate transportation in Tennessee are on the average inferior to service conditions in interstate transportation:* It was shown that 38.54 per cent of the service rendered on the main track mileage in Tennessee of the Nashville, Chattanooga & St. Louis Railway, identified as a typical Tennessee carrier, consisted of local service, almost wholly intrastate, in which passenger service consists of a coach attached to a freight train which habitually runs late, which operates at a speed of ten to twelve miles per hour, and which coach is equipped with primitive and unsanitary toilet facilities, open vestibules, and is ordinarily unclean. (R. 251; 362; 235-244.)

In comparison with this it was shown that four de luxe streamlined trains operate through the State

of Tennessee, carrying interstate passengers only and making stops within the State of Tennessee only to take on or discharge passengers from or to out-of-state points, these trains being equipped with deluxe reclining reserved seat coaches, completely air conditioned, having private dining car service, observation cars, and in some cases are serviced by stewardesses and registered nurses. They operate through the state at an average speed of 44.6 to 51 miles per hour. (R. 312; 367-371; 260-267.)

It is also shown that trains are being operated into and through Tennessee with crowded passenger conditions and a large number of passengers are having to stand. The evidence shows that long-haul passengers, most of whom are interstate, have the opportunity to obtain and preempt the seats as passengers get on and off, whereas local passengers, predominantly intrastate, do not have such frequent opportunities to obtain seats and furnish the larger proportion of standees. (R. 228-230.)

8. *Evidence of revenue needs of the carriers:* The railroads introduced testimony relative to increased expenses of passenger operations within recent years and months. The general items of increased expense listed by the carriers were occasioned as follows: (1) the increased amount of passenger traffic; (2) the large number of troop trains and troop cars which require priority in handling and occasion delays and added expense in both passenger and freight transportation; (3) the cost of modernizing passenger equipment through air conditioning; and (4) the mountainous conditions in certain parts of Tennessee which require helper service and addi-

tional locomotives in order to carry through trains. (R. 86-89; 105-108.)

The record shows that all of the troop movements within the State of Tennessee are interstate in character and the additional expense thereof is incidental to interstate transportation. (R. 285.)

The mountainous section referred to which requires helper service is on the Nashville, Chattanooga and St. Louis Railway at Cowan, Tennessee, which lies between Nashville and Chattanooga near the Alabama-Tennessee state line. The service consists of a mountain engine, engineer, fireman, and conductor; the helper service is used only for through trains from Chicago to Florida, and such trains cannot and do not carry intrastate passengers over the mountain, there being no scheduled stop between the mountain and the Tennessee state line on any such through trains with one exception. It would be possible in the case of an emergency involving severe illness or death for such a train to stop at Sherwood, Tennessee, and thus discharge an intrastate passenger, but this is the only possibility of intrastate service benefiting from the helper service described. The local trains which stop at all local stations do not use the helper service. (R. 380; 115-117; 267.)

All of the items of increased expense as claimed by the carriers are for expenses which are predominantly interstate in character. (R. 286-287.)

In addition the railroads presented statistical exhibits intended to show that they are entitled to receive excessively high revenues at the present because of low general earnings since 1921, and in order to recoup for passenger deficits prior to 1942.

All of said statistical exhibits were objected to, but such objections were overruled and the Commission took into account the contention made by the carriers, and recited the depression passenger deficits in its report. (R. 141; 343; 345; 352-353; 355; 126-129; 137-138.)

9. *Lack of evidence of any revenue burden upon interstate commerce:* All parties to these proceedings admitted the disparity between interstate and intrastate coach passenger fares. This disparity amounted to the difference between 1.65 cents per mile one-way fare, intrastate, and 2.2 cents per mile one-way fare, interstate, with corresponding disparities in round-trip transportation.

As a corollary to the above it is also conceded by all parties that the intrastate rates based on a mileage fare of 1.65 cents would produce less revenues than if based on a mileage fare of 2.2 cents. The amount of this disparity in revenues is calculated by the carriers, and accepted by the State and its Commission, to be \$556,280 in Tennessee on an annual basis. This aggregate is made up as follows:

| | |
|--|-----------|
| Nashville, Chattanooga and St. Louis Railway | \$240,215 |
| Southern Railway Company | 183,925 |
| Louisville & Nashville Railroad | 115,718 |
| Cincinnati, New Orleans & Texas Pacific Railroad | 12,972 |
| Carolina, Clinchfield & Ohio Railway | 2,058 |
| Illinois Central Railroad | 856 |
| Gulf, Mobile & Ohio Railroad | 536 |

| | |
|-------|-----------|
| Total | \$556,280 |
|-------|-----------|

(R. 141; 341.)

In the record the carriers refer to this as a "loss in intrastate revenues" and rely upon it as the sole evidence in the record to sustain the necessary finding that traffic moving under the lower intrastate

fares is not contributing its fair share of the revenues required to enable the carriers to render adequate and efficient transportation service. (R. 122; 38.)

The record also demonstrates that for the year ending September 30, 1943, the rate of return, before federal income taxes, of the four railway companies which are the prime beneficiaries of the increased rates ordered by the Interstate Commerce Commission on their investment in railway property used in transportation service, plus cash, materials, and supplies was as follows:

| | |
|--|-------|
| Cincinnati, New Orleans & Texas Pacific Railroad | 17.2% |
| Southern Railway Company | 15.1% |
| Louisville & Nashville Railroad | 15.7% |
| Nashville, Chattanooga & St. Louis Railway | 12.4% |

(R. 323-24; 414.)

On the same basis the total rate of return for all of the eight carriers for which information was available, this including all seven of the carriers which will participate in the increase of revenues if the rate increase is permitted to stand, was 12.8 per cent. (R. 323-324; 414.)

During the year ending September 30, 1943, the carriers operating in Tennessee earned in excess of a fair return, their present earnings are at an even higher level, and they do not need the revenues from the increase of intrastate fares in order to enable them to earn a fair return. (R. 322-323.)

The revenues derived from passenger traffic have become very profitable in the period since 1941. Since that time both the average number of passenger cars in each passenger train and the average number of passengers in each passenger car on the

major railroads operating in Tennessee have shown an increase. The number of passenger cars per train has increased in 1942 over 1941 for the Southern Railway by 20 per cent; for the Louisville & Nashville Railroad by 11 per cent; for the Tennessee Central by 36 per cent; for the Nashville, Chattanooga & St. Louis Railway by 10 per cent; and for the Cincinnati, New Orleans & Texas Pacific Railway by 3 per cent. The average number of passengers in each passenger car has increased for the same period as follows: Cincinnati, New Orleans & Texas Pacific Railway, 102 per cent; Southern Railway, 71 per cent; Louisville & Nashville Railroad, 71 per cent; Tennessee Central Railway, 140 per cent; Nashville, Chattanooga & St. Louis Railway, 87 per cent. (R. 312; 365.)

The increase in carloadings has resulted in a large increase in per car earnings (passenger traffic) for 1942 over those of 1941. The average revenue per passenger car mile in cents has increased as follows: for the Cincinnati, New Orleans & Texas Pacific Railway, from 25 cents to 45 cents, or an increase of 85 per cent; for the Southern Railway, from 29 cents to 46 cents, or an increase of 56 per cent; for the Louisville & Nashville Railroad, from 22 cents to 37 cents, or an increase of 65 per cent; for the Illinois Central, from 23 cents to 34 cents, or an increase of 44 per cent; for the Tennessee Central Railway, from 11 cents to 25 cents, or an increase of 116 per cent; and for the Nashville, Chattanooga & St. Louis Railway, from 21 cents to 37 cents, or an increase of 76 per cent. (R. 312; 365.)

The evidence also shows that this same trend of increase was projected into the first nine months of

1943, although the detailed figures for the separate railroads were not available. The record shows that for the entire southern region the first eight months of 1943 reflect a similar increase over 1942 as follows: the average revenue per passenger car mile in the southern region increased from 46 cents to 55 cents, or a 19 per cent increase. (R. 312; 366.)

The uncontroverted evidence in the record shows that the intrastate fare of 1.65 cents per mile exceeds by 35 per cent the fares required to enable respondents to render adequate and efficient transportation service. The expense of transportation in coaches in Tennessee was at the time of the hearing 1.22 cents per passenger mile or less, as compared with the intrastate fare of 1.65 cents per mile. Said requirements for the year 1942 may be calculated from evidence filed by the carriers as follows:

| | |
|---|--------------|
| Revenues per coach mile (R. 141; 349) | 48.36 cents |
| Multiplied by passenger operating ratio (R. 141; 346) | .72 |
| Expense per coach mile | 34.819 cents |
| Divided by passenger miles per coach mile (R. 141; 356) | 28.51 |
| Expenses per passenger mile | 1.22 cents |

Application of this same formula to the four Tennessee railroads which are the principal beneficiaries of this proceeding shows that even less revenues are required by these four roads in order to enable them to defray the expense of transportation. The table is as follows:

| Railroads | Revenues Per Coach Mile (R. 141; 349) | Passenger Operating Ratio (R. 141; 349) | Expense Per Coach Mile | Divided by Passenger Mile Per Coach Mile (R. 141; 350) | Expense Per Passenger Mile |
|--|---|--|---------------------------|---|-------------------------------|
| Southern Railway | 57.89c | .57 | 32.99c | 36.19 | .91c |
| Louisville & Nashville Rail- road | 43.72c | .72 | 31.47c | 27.71 | 1.13c |
| Cincinnati, New Orleans & Texas Pacific Railway | 51.85c | .62 | 32.14c | 31.65 | 1.01c |
| Nashville, Chattanooga & St. Louis Railway | 50.17c | .70 | 35.11c | 32.59 | 1.07c |

Every indication in the record is that these unit cost figures, based upon the experience of the year 1942, are too high rather than too low when applied to the operating results of 1943. At the time of the hearing the latest operating figures available were for September, 1943, but the estimated passenger service operating ratios for 1943 were at that time as follows: Cincinnati, New Orleans & Texas Pacific Railway, 52.8 per cent; Southern Railway, 47.1 per cent; Louisville & Nashville Railroad, 52.5 per cent; Nashville, Chattanooga & St. Louis Railway, 58.9 per cent; and for the aggregate of all eight Tennessee railroads, 56 per cent. (R. 323-324; 411.) At the same time a comparison of passenger revenues for the nine elapsed months of 1943 with those of the calendar year of 1942 reflected large percentage increases, ranging with the various major carriers from 14 per cent to 46 per cent. (R. 312; 364.) Likewise the revenue per passenger car mile was showing an increase of more than 18 per cent over 1942. (R. 312; 366.)

Revenue passenger miles per car mile increased in 1943 on the Southern Railway from 25.25 to 31.89; on the Louisville & Nashville from 21.11 to

33.83; on the Cincinnati, New Orleans & Texas Pacific from 27.56 to 29.83; and on the Nashville, Chattanooga & St. Louis Railway from 25.16 to 34.86. (R. 312; 356.)

The distinct tendency that the increase in revenue passenger miles per car mile would have to reduce unit costs leads to the inescapable inference that the cost per mile in coaches throughout 1943 on each of the major Tennessee carriers was considerably less than one cent per mile.

Accordingly, a second computation of unit costs per coach passenger mile for all Class I railroads in the southern district for the year 1943 is estimated on the following basis: expense per coach car mile, 27.68 cents; divided by coach passenger miles per coach car mile, 41, produces the expense per coach passenger mile of .68 cent. (R. 501.)

THE ALABAMA AND KENTUCKY RECORDS

Simultaneously with the filing of complaint by the State of Tennessee and its regulatory commission, companion suits were filed by the State of Alabama and the Commonwealth of Kentucky, and their respective Commissions. The complaints in each of these companion cases were similar, though not identical, with that filed in the Tennessee case. (R. 506-513; 1047-1061.) Similar answers to those filed in the Tennessee case were filed by the defendants United States and Interstate Commerce Commission and the intervening railroad companies of the respective States. (R. 532-533; 533-540; 540-541; 1125-1126; 1128-1134; 1136-1137.) Likewise similar evidence was introduced in these cases, respec-

tively, and similar, though not identical, exhibits. (R. 547-1046A; 1140-1340.)

The three suits were thereupon on June 20, 1944, consolidated for hearing before a Three-Judge District Court convened pursuant to Section 47, Title 28, of the United States Code. (R. 419.)

OPINION OF THE DISTRICT COURT

On August 3, 1944, the Special District Court for the Western District of Kentucky rendered its opinion, holding that the injunction prayed for in the consolidated cases should be denied and the proceedings dismissed, and on the same date by appropriate decree dismissed the action. (R. 1345-1362; 1362-1363.)

The Court recited the history of passenger fares in the southern region, and the proceedings before the Interstate Commerce Commission and the respective State Commissions relative thereto, this recitation of the history of the fares being virtually as set out hereinabove. (R. 1346-1350.) After setting out the six specific findings of the Interstate Commerce Commission in full, the Court recited the facts relative to the filing of the three actions in the United States District Court for the Western District of Kentucky, describing the complaints as follows:

The complaints after stating the foregoing facts in detail allege that the corrected order of the Interstate Commerce Commission of May 8, 1944, constitutes an unwarranted and unjustified invasion of the sovereignty of the State in that it exceeds the powers granted to the Federal Congress by the Commerce Clause of

Section 8 of Article 1 of the Constitution of the United States; that said order contravenes the Fifth and Tenth Amendments of said Constitution; that there was no evidence before the Commission to support the report, findings, and order made by it; that the corrected order of May 8, 1944, is in contravention of the Stabilization Program of the Federal Government as embodied in the Emergency Price Control Act of 1942 and its amendment of October 2, 1942; and that unless said order is set aside and annulled innumerable citizens in the respective States will suffer irreparable injury and damage in the form of excessive passenger fares in intrastate transportation and the respective State Commissions will be deprived of their rights to regulate intrastate commerce and intrastate passenger fares on railroads operating in said States. (R. 1351.)

The opinion also sets out in substance the intervening petitions filed by Fred M. Vinson, director of the Office of Economic Stabilization, through Chester Bowles, price administrator of the Office of Price Administration, and the pleadings and answers filed by the United States, the Interstate Commerce Commission, and the carriers of the respective States. (R. 1352.)

The opinion sets out the substance of the statutory provisions, Sections 13 and 15 of the Interstate Commerce Act (Title 29, United States Code), Section 13 relating to undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or undue, unreasonable, or unjust discrimination against interstate commerce. The opinion recites the following:

The State Commissions recognize the constitutionality of this legislation, which has been many times upheld, but they contend and rightly so, that the power of the Commission to fix intrastate rates is limited to the two situations (1) where the evidence shows a preference as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, and (2) where the evidence shows any unreasonable or unjust discrimination against interstate commerce. Any attempt on the part of the Interstate Commerce Commission to regulate intrastate rates where one of these two situations does not exist would be in conflict with the Tenth Amendment to the United States Constitution. (R. 1353.)

The Court also stated that it recognized the dovetail relationship between the purpose of Section 15 of the Act and the authority of the Commission under Section 13 (4) of the Act to remove undue or unjust discrimination against interstate commerce, this dovetail relationship arising from the requirement that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. (R. 1354.) The Court also discussed the province of the Court in reviewing the findings of administrative bodies, and recognized the well-established principle that the Court may not substitute its discretion and opinion for that of the administrative body. (R. 1354-1355.)

The Court stated that the validity of the Commission's order rests primarily upon the basic fact that the interstate coach fares are just and reasonable. It based its finding that the interstate coach fares are just and reasonable upon the series of hearings conducted by the Interstate Commerce Com-

mission in Ex Parte 148, *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, in which proceedings the carriers operating in Southern Passenger Association territory were authorized and empowered to raise their fares from 1.65 cents per mile to 2.2 cents per mile in coaches. (R. 1355-1357.)

The petitioners did not contest the second finding of the Commission, but the Court made the grievous error of stating that the fifth finding of the Commission appears not to be seriously contested by the petitioners. (R. 1357.) On the contrary, the fifth finding of the Commission is the most vigorously contested by all the petitioners, and these appeals rest almost wholly upon the fact that this finding of the Commission was erroneous. The fifth finding of the Commission consists of two completely separate and unrelated findings joined with the conjunction "and." It is as follows:

Respondents' revenues under the lower intrastate fares are less by at least \$725,000 per annum in Alabama, \$500,000 in Kentucky, \$525,000 in North Carolina, and \$525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and *traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service.* (Appendix B, herein, page 94; italics supplied.)

The second clause of this finding is strongly contested by all petitioners who insist that the uncontroverted evidence is that traffic moving under these lower intrastate fares *is* contributing its fair share

of revenues required to enable respondents to render adequate and efficient transportation service. (R. 15-18; 511; 1059.)

The third and fourth findings of the Commission are to the effect that the conditions affecting intrastate transportation on the one hand and interstate transportation on the other are substantially similar. The Court holds that this finding is supported by substantial evidence, despite the fact that in some instances the streamlined de luxe trains, which offer a much higher standard of service to the traveling public than regular trains, in certain instances make but one regular stop within a state, which prevents transportation of intrastate passengers in that state. The Court holds that due to the relative insignificance of this type of transportation this fact can be largely disregarded in making the "general findings" referred to. The second part of the fourth finding holds that intrastate passengers receive an undue preference and interstate passengers suffer an undue and unreasonable disadvantage and prejudice. The Court states that this finding "may or may not be sufficiently supported by the evidence." In effect the Court thus refuses to support this finding by the Commission, thus eliminating the issue of preference to intrastate passengers or prejudice against interstate passengers. (R. 1358.)

The Court discussed the Commission's sixth finding, which is that the lower intrastate coach fares cause undue, unreasonable, and unjust discrimination against interstate commerce. This finding relates back to the part of the fifth finding to the effect that traffic moving under the lower intrastate fares does not contribute its fair share of the reve-

nues required to enable the railroads to render adequate service. The opinion of the Court, however, does not recognize this relationship. The Court, after describing the conditions of passenger traffic on the railroads in the four states, makes the following statement:

Under such conditions the effect of maintaining a materially lower rate intrastate than the reasonable interstate rate necessarily results in intrastate traffic failing to pay a fair proportionate share of the cost, maintenance, and operation, and is discriminatory against interstate traffic. (R. 1358-1359.)

The foregoing quotation completely begs the question as to whether there was an actual revenue burden upon interstate commerce from the intrastate fares. It was urged by all petitioners that the passenger fares on the basis of 1.65 cents per mile were adequate under present-day conditions of traffic (1) to provide the railroads with a reasonable rate of return, and (2) to provide the carriers with far in excess of the expense necessary to enable the carriers to provide adequate and efficient transportation service. In its discussion of this finding the Court in effect conceded these facts, saying:

Petitioners contend that existing rates yield sufficient revenue to constitute a reasonable return to the carriers, that the additional revenue from raising the intrastate rates is not necessary, and that the resulting total revenue will be materially more than the carriers are legally entitled to receive. That may be the result, at least temporarily. But the proposed increased rates are not based on the need for additional revenue. The proposed increase is for the pur-

pose of removing an unjust discrimination against interstate commerce which the Commission is empowered to do regardless of resulting increased revenues or the non-existence of any need for the same. (R. 1359.)

In the final section of the opinion the Court disposed of the contentions relative to the failure of the Interstate Commerce Commission to accommodate the exercise of its power to the Congressional policies embraced in the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942. The Court held that the Commission had properly given consideration to the policies inherent in these statutes, and had given the Price Administrator the opportunity to be heard which is provided by these statutes. (R. 1360-1361.)

APPEAL TO THIS COURT

On September 1, 1944, the several parties filed their petitions praying that they be permitted to prosecute an appeal to the Supreme Court of the United States, and on the same day the Special District Court entered its order allowing and permitting said appeal. (R. 1365-1366; 1373-1374.)

SPECIFICATION OF ASSIGNED ERRORS

The Appellants, State of Tennessee and Railroad and Public Utilities Commission of the State of Tennessee, specify the following errors heretofore assigned, which they urge as sufficient grounds for reversing the decree of the District Court and setting aside the order of the Interstate Commerce Commission:

1. The District Court erred as a matter of law in refusing to enjoin, set aside, and annul the order of the Interstate Commerce Commission on the ground that said order was not based on adequate findings by the Commission supported by substantial evidence before the Commission. (Error II; R. 1367.)

2. The Court erred in holding as a conclusion of law that the Interstate Commerce Commission is empowered to remove unjust discrimination against interstate commerce by increasing intrastate fares "regardless of resulting increased revenues or the nonexistence of any need for the same." (Error XVII; R. 1370.)

3. The Court erred in declining to set aside, annul, and enjoin said order of the Interstate Commerce Commission because for the first time in the history of railroading, so far as we are advised, said order of the Commission permitted and directed an increase of revenue to the carriers when there was shown no revenue necessity therefor and, on the contrary, it appeared from all the testimony that such increase only increased the already excessive profits of the railroads on such operation. (Error XX; R. 1371.)

4. The Court erred in finding as a fact that "the second and fifth findings of the Commission appear not to be seriously contested by the petitioners, and in any event are fully sustained by the evidence." (Error XIII; R. 1369.)

5. The Court erred in declining to set aside, annul, and enjoin the order of the Interstate Commerce Commission on the ground that the Commission had no power to order increases in the in-

trastate coach fares of Alabama, Kentucky, and Tennessee in order to compensate for passenger service deficits incurred during prior years, which deficits were in fact compensated by a support factor in freight rates. (Error XXII; R. 1371.)

6. The Court erred in finding as a fact that the findings and order of the Interstate Commerce Commission in *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545, commonly referred to as Ex Parte 148, "supplemented with current statistical data and the evidence of increased operating costs largely attributable to wartime conditions," was sufficient evidence to sustain the Commission's first finding of facts—namely, that the interstate coach fares to, from, and through the states of Alabama, Kentucky, and Tennessee are just and reasonable. (Error XII; R. 1369.)

7. The Court erred in finding as a fact that "a review of the record discloses substantial evidence to support these findings"—namely, those portions of the third and fourth findings of the Commission, wherein the Commission found that the conditions affecting the transportation of passengers in coaches within the three states involved, intrastate on the one hand, and interstate to, from, and through these states on the other, were substantially similar. (Error XIV; R. 1369.)

8. The Court erred in holding as a conclusion of law that "under such conditions (intermingling of interstate and intrastate passengers on same trains and in same cars) the effect of maintaining a materially lower rate intrastate than the reasonable interstate rate necessarily results in intrastate traffic failing to pay a fair proportionate share of

the cost, maintenance, and operation, and is discriminatory against interstate traffic. * * * The existence of such discrimination against interstate commerce, regardless of the nonexistence of any advantage as between persons or localities is sufficient justification for the Commission to end the disparity by ordering it removed." (Error XVI; R. 1370.)

9. The Court erred in its finding of fact No. 6, in that such finding purports to find that the findings of the Interstate Commerce Commission in its report of March 25, 1944, in Dockets Nos. 28963, Alabama Intrastate Fares; 29000, Kentucky Intrastate Fares; and 29037, Tennessee Intrastate Fares, are supported by substantial evidence. (Error VII; R. 1368.)

SUMMARY OF ARGUMENT

Virtually all of the argument in this brief is addressed to various aspects of the single proposition that the record in this case does not support, contrary to the holding of the District Court, the finding of the Commission, that "traffic moving under these lower fares is not contributing its fair share of the revenues *required* to enable respondents (the Tennessee railroads) to render adequate and efficient transportation service." (*Italics supplied.*) This finding is an essential prerequisite to a holding by the Commission that the intrastate fares unduly and unjustly discriminate against interstate commerce.

Of the three kinds of discrimination prohibited by Section 13(4)—namely, (1) discrimination against persons, (2) discrimination against localities, and (3) discrimination against interstate commerce—only the third is presently at issue in this case. The Commission failed to find discrimination against localities, and the District Court failed to find discrimination against persons, thus eliminating this issue under the authority of *Wisconsin R. Comm. vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563 (1922); *New York vs. United States*, 257 U. S. 591 (1922); *Passenger Fares and Charges for Intrastate Traffic in Georgia*, 214 I. C. C. 567.

Accordingly, this argument relates only to unjust and undue discrimination against interstate commerce, and is presented under the following series of twelve propositions:

I. The authority of the Interstate Commerce Commission in respect to intrastate rates rests upon

the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce.

II. The present case represents an effort to extend the authority of the Interstate Commerce Commission in respect to intrastate commerce to those cases where there is no crippling, retarding, or hindering of interstate commerce, nor any revenue burden upon it, but where a sole and simple disparity between interstate and intrastate rate levels prevails.

III. The present case differs from all former Section 13 cases before this Court because it is the first in which the carriers could make no clear and convincing showing of inadequate earnings.

IV. Unable to show that under present circumstances they require increased earnings, the carriers now urge that they need show only (1) that the rates differ, and (2) that if increased the intrastate rates would produce substantial increased revenues.

V. The record in this case shows conclusively that southern rail carriers are earning at excessively high rates of return before payment of federal income and excess profits taxes.

VI. Rates of return after payment of federal taxes are also greatly in excess of a fair return.

VII. Passenger operating ratios are lower than at any time in history and passenger traffic, both interstate and intrastate, is today contributing a larger proportion of rail profits than is freight traffic.

VIII. The unit cost of passenger traffic in coaches is far less than the intrastate fares, thus

demonstrating that if all fares, intrastate and interstate, were on the intrastate level, the carriers would still be deriving an adequate return.

IX. In the absence of evidence of any need on the part of carriers for increased revenues the order of the Interstate Commerce Commission was an unconstitutional usurpation of the power of the States, in contravention of the Tenth Amendment of the Constitution of the United States.

X. The evidence of record establishes that the standards of through service on the railroads, predominantly interstate, are of superior quality to the standards of local service, predominantly intrastate, and that intrastate passenger transportation in Tennessee, on the average, is of an inferior grade to the service offered interstate passengers, on the average.

XI. There is no evidence in the record justifying the Commission in finding that the interstate fares are just and reasonable, such a finding being a necessary prerequisite to action under Section 13(4).

XII. The effect of the action of the Interstate Commerce Commission is not beneficial to the national economy, inasmuch as it is an administrative nullification of a justified regulatory procedure, in the insulated chambers afforded by the several States, without a proper regard for the rightful concern of local interests in local transportation facilities.

ARGUMENT

I

The authority of the Interstate Commerce Commission in respect to intrastate rates rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce.

Congress has power under Article One, Section 8, Clause 3 of the United States Constitution "to regulate commerce among the several states." This power of Congress does not apply to commerce which is purely internal, as it was held in one of the notable opinions of Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat. 1 (1824). The grant of power to Congress virtually denies power to interfere with the internal trade and business of the separate states except as a necessary and proper means of carrying into execution some other power expressly granted. There is an important exception to this general rule, which is that, although activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. This is the doctrine of the *Shreveport* case, *Houston, E. & W. T. R. Co. vs. United States*, 234 U. S. 342 (1914), and also the case of *Schechter Poultry Corp. vs. United States*, 295 U. S. 495 (1935).

Congress in the exercise of its paramount power may prevent the common instrumentalities of in-

terstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. While Congress does not possess authority to regulate the internal commerce of a state, as such, it does possess power to foster and protect interstate commerce, although in taking necessary measures so to do it may be necessary to control intrastate transactions of interstate carriers. However, this power of Congress is an authority to exercise incidental and partial control of intrastate commerce when necessary to an adequate maintenance of interstate commerce. Section 13 of the Interstate Commerce Act but implements this constitutional power of Congress.

The Interstate Commerce Commission, to which Congress has delegated the authority to regulate intrastate commerce under the incidental and limited circumstances referred to above, cannot make an order setting aside a lawful intrastate rate in the absence of a finding, based on sufficient evidentiary facts, that such rates impose a *burden upon interstate commerce*. The intrastate transactions of interstate carriers may not be regulated by the Interstate Commerce Commission except when the facts conclusively show that such regulation is necessary to foster and protect interstate commerce. Numerous opinions of this Court support this proposition, among them being:

Baltimore & Ohio R. R. Co. vs. Interstate Commerce Commission, 221 U. S. 612 (1911).

Southern Railway Co. vs. United States, 222 U. S. 20 (1911).

Wisconsin R. Com. vs. Chicago B. & Q. R. Co., 257 U. S. 563 (1922).

Alabama vs. United States, 279 U. S. 229 (1929).

Florida vs. United States, 282 U. S. 194 (1931).

Florida vs. United States, 292 U. S. 1 (1934).

The second part of Section 13 (4) of the Interstate Commerce Act prohibits and makes unlawful any undue, unreasonable, or unjust discrimination against interstate commerce caused by rates established on the authority of the State. The clause referred to, which is set out in full in Appendix A, pages 91 and 92 hereunder, recites that whenever the Commission, after hearing, finds that any fare causes "any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe" the fare or charge thereafter to be observed, so as to remove the discrimination. This part of the section, by firmly established authority, is related to the right of the carriers to obtain a fair return on the value of the property which they have dedicated to the public service—the discrimination which is prohibited is generally given the name of "revenue discrimination." The federal power may not be exercised in the absence of a showing that the intrastate rates impose a revenue burden upon interstate commerce. In every case in which the Supreme Court of the United States has confirmed the jurisdiction of the Interstate Commerce Commission to regulate intrastate commerce there have been findings supported by substantial evidence that the earnings of the carriers were at depressed levels—this is tantamount to saying they were below the level necessary for them to enjoy a fair rate of re-

turn. This is the meaning of a revenue burden upon interstate commerce.

Upon the present record before the Interstate Commerce Commission there was no evidence to sustain a finding that any appellee railroads are at present in need of additional passenger revenues in order to enable them to adequately and efficiently serve the nation's transportation needs, and the record establishes the fact that present rail earnings are far in excess of those which would enable them to obtain a fair return.

II

The present case represents an effort to extend the authority of the Interstate Commerce Commission in respect to intrastate commerce to those cases where there is no crippling, retarding, or hindering of interstate commerce, nor any revenue burden upon it, but where a sole and simple disparity between interstate and intrastate rate levels prevails.

The instant case represents a determined effort on the part of the rail carriers to prevail upon the Interstate Commerce Commission and the Courts to relax the standards of proof which have governed the finding of a revenue burden upon interstate commerce, and by this means to extend the jurisdiction of the Commission over intrastate commerce. They were successful in persuading the Commission to find a revenue burden upon a mere showing that a disparity between interstate and intrastate fares exists, coupled with the corollary showing, conceded by all, that higher rates would produce higher revenues, amounting to some \$525,000 in Tennessee, between 80 per cent and 90 per cent of which must be

passed on to the federal government as excess profits taxes.

With such ingenuity did the railroads press this point that they were able to draw an opinion from the District Court that the difference between the interstate and intrastate fares of itself "necessarily results in intrastate traffic failing to pay a fair proportionate share of the cost, maintenance, and operation and is discriminatory against interstate traffic." (R. 1358-1359.)

The conclusion of the District Court carries the argument of the railways and the Interstate Commerce Commission to its logical limits, but at the same time it is directly contrary to the express holding of this Court in *Florida vs. United States*, 282 U. S. 194, 212, 75 L. ed. 291, 302, in which the Court said:

The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. *Arkansas R. Commission vs. Chicago R. I. & P. R. Co.*, 274 U. S. 597, 71 L. ed. 1224, 47 S. Ct. 724, *supra*.

Both this Court and the Interstate Commerce Commission have formerly held that the showing of a mere disparity between interstate and intrastate rates is not sufficient to support a finding of undue, unreasonable, or unjust discrimination against interstate commerce. *Utah Edible Livestock Rates and Charges*, 206 I. C. C. 309.

If this decision of the District Court is sustained, it will bring to naught the many decisions which have held that something more than mere disparity

is essential to justify the finding of a burden against interstate commerce. It is our strong insistence that discrimination against interstate commerce is not so easily demonstrated as this. Such discrimination is related to the earnings of the carriers, through their rate of return, and likewise through the cost of rendering the service. It does not result from this that a mere showing of the fact that the rates are different warrants an order under Section 13.

III

The present case differs from all former Section 13 cases before this Court because it is the first in which the carriers could make no clear and convincing showing of inadequate earnings.

In one salient and controlling respect, the present case is one of first impression. In the many cases which have been before this Court to test the validity of Section 13 orders of the Interstate Commerce Commission, this is the first in which the Commission's order has been challenged because of an improper finding that the carriers *require the revenues* which the increased rates would provide in order to enable them to render adequate and efficient railway transportation service. In every former Section 13 case the Interstate Commerce Commission has made such a finding, or its equivalent, but such findings have never been excepted to on appeal. The reason for this is obvious; in every prior case the railroad industry was suffering under depressed conditions of traffic and earnings, and the evidence before the Commission in all former cases amply sustained that **particular finding**.

One striking example will be sufficient to show

that this is so. In the case of *United States vs. State of Louisiana*, 290 U. S. 70, 78 L. ed. 181 (1933), the Supreme Court of the United States had under review an order of the Interstate Commerce Commission in *Increases in Intrastate Freight Rates*, 186 I. C. C. 615. In the report of the Interstate Commerce Commission findings were made showing the serious revenue needs of the carriers, these findings being taken very largely from the conditions which were more explicitly shown to the Interstate Commerce Commission in *Ex Parte 103, Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, 179 I. C. C. 215. In its report in *Increases in Intrastate Rates*, the Commission made the following findings:

It was shown that the earnings of the carriers, due to great shrinkage in traffic, were grossly inadequate, that their credit was vitally impaired, and that they were confronted by a serious financial emergency.

The Commission also quoted from its decision in *Ex Parte 103* as follows:

It is motivated by the thought that the distrust of railroad securities is rapidly gaining such elements of panic that a slight charge on the industries of the country best able to stand it may justifiably be imposed, through freight rates, for the purpose of increasing confidence and averting developments which might further disturb an already tremendously shaken financial situation, and to avoid impairment of an adequate system of transportation.

And following these findings the Commission went further and said:

... Where an increase in the general level of rates, however, is required to sustain a rail-

road system "adequate to the needs of the country" to use the words of the Court, it is manifest that the "great purpose" of the act cannot be accomplished unless intrastate rates are dealt with in the same way as interstate rates.

The case was appealed to a three-judge court and thereafter to the Supreme Court of the United States. The record in the case was so conclusive on the basic finding that the earnings of the carriers were wholly inadequate, that this finding of the Interstate Commerce Commission was never challenged in any respect. It was accepted by the State of Louisiana, which prosecuted the appeal. An exhibit filed by the railroads in the present case shows that southern carriers in 1931 earned at a rate of return of 1.33 per cent, and in 1932 at a rate of 0.78 per cent. (R. 141; 343). Since the State was under compulsion to admit the adequacy of the evidence to sustain this finding, it was forced to rely upon a number of technical errors, and seek out such minor inaccuracies in the findings of the Commission as might be regarded by the Court as fatal. It alleged that the Interstate Commerce Commission had not found that the interstate rates are just and reasonable; it alleged that the procedure followed by the Commission in hearing the case was irregular; and it alleged that the order of the Commission in Ex Parte 103 was permissive to the carriers, and therefore could not be used as a basis for thirteenth section relief.

The Supreme Court, when it considered the appeal in *United States of America vs. State of Louisiana, supra*, discussed the revenue requirements of the carriers and commented as follows:

In Fifteen Per Cent Case, 1931, the Commission, after a careful survey, found itself faced with an acute emergency calling for prompt action to give temporary relief to the transportation system.

The discussion by Mr. Justice Stone of the revenue requirements essential to a Section 13 order is as follows:

By Section 416 of the Transportation Act, Section 13 (4) Interstate Commerce Act, U. S. C. Title 49, Section 13, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce by prescribing minimum intrastate rates. This Court has consistently held that this section is to be construed in the light of Section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of Section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So construed, Section 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Railroad Commission vs. Chicago B. & Q. R. Co.*, *supra* (257 U. S. 586, 590, 66 L. ed. 382, 384, 42 S. Ct. 232, 22 A. L. R. 1086); *New York vs. United States*, 257 U. S. 591, 601, 66 L. ed. 385, 391, 42 S. Ct. 239; *Florida vs. United States*, *supra* (282 U. S. 214, 75 L. ed. 303, 51 S. Ct. 119); *Louisiana vs. United States*, 284 U. S. 125, 131, 76 L. ed. 201,

204, 52 S. Ct. 74; see *Nashville, C. & St. L. R. Co. vs. Tennessee*, 262 U. S. 318, 67 L. ed. 999, 43 S. Ct. 583.

As pointed out in the reports of the Commission in this case and others (see *Re Increased Rates*, 1920, 59 Inters. Com. Rep. 290), Section 15a by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the New England Divisions Case (*Akron C. & Y. R. Co. vs. United States*) *supra* (261 U. S. 197, 198, 67 L. ed. 612, 613, 43 S. Ct. 270), this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule.

The case of *Commonwealth of Kentucky vs. United States*, 3 F. Supp. 778 (1933), is also an appeal from the decision of the Interstate Commerce Commission in *Increases in Intrastate Freight Rates*, 186 I. C. C. 615. Issues arising out of the Fifteen Per Cent Case were also in controversy here, but the question was not raised as to whether the carriers earning less than 1½ per cent had need of additional revenue. The Commonwealth of Kentucky did not challenge the finding of the Commission that increased revenues were required to support the national transportation system. Instead it had to rely upon other exceptions and these again were a number of technical objections to various findings of the Commission.

Still another example is the case of *State of Florida vs. United States*, 282 U. S. 194 (1931). In this case the Interstate Commerce Commission found that the carriers involved were in need of additional revenues from intrastate rates in order to enable them to enjoy adequate and sufficient earnings, but it failed to make a finding that the increase in intrastate fares would produce additional earnings to the carriers.

On such a record the State of Florida, appealing to the Supreme Court of the United States, did not question the finding that the carriers needed additional revenues, but it did challenge the failure of the Commission to find that the increased intrastate rates would produce additional revenues. This Court struck down the order of the Interstate Commerce Commission because of its failure to make the technical findings that the revenues would be increased if the intrastate rates were raised to the interstate level. *A priori* we contend that the Supreme Court would have stricken down the order of the Interstate Commerce Commission if the State of Florida had been able to show that the finding that the carriers needed additional revenues was made in the teeth of evidence clearly showing that the carriers were enjoying adequate and sufficient revenues, and earning at the rates of return of 1943-44 instead of 1930-31.

Every decision of the Supreme Court of the United States bearing upon the thirteenth section of the Interstate Commerce Act, prior to those made under conditions of 1942, 1943, and 1944, must be distinguished from the present case because of the simple and uncontrovertible fact that there is no

former period during the memory of the present generation when a finding of the Interstate Commerce Commission that the carriers required additional revenues in order to enable them to adequately and sufficiently meet the transportation needs of the country could have been controverted.

The present record shows that during 1942 and 1943 railroad earnings were phenomenal. They were unparalleled in either peacetimes or war, in periods of depression or of prosperity. The failure of the railroads of Tennessee to receive the additional revenues from the increase of intrastate coach fares will in no material way impair the financial strength of these railroads or their ability to render adequate service during the war. The railroads will retain without the increases huge and truly extraordinary profits. Their financial condition is so much better than it has ever been that any talk of endangering the financial strength of the railroads must be disregarded. Typical of this prosperity is the 1942 report of the president of the Southern Railway to its stockholders, in which the following statements were made:

With a somewhat larger non-operating income than in 1941, and with smaller fixed charges, there was after charges a net income of \$33,388,868 for the year 1942. These earnings constituted an increase of \$14,018,974 over net income for 1941, and of \$9,792,146 over 1926, the previous high year since the company's organization. Fixed charges were covered 3.13 times and, after deducting dividends on the preferred stock, earnings amounted to \$23.41 per share of common stock. (R. 312; 390.)

During 1942, 1943, and 1944 we had three years

of actual war experience in rail transportation. Any emergency that anyone may have feared growing out of the war has not materialized so far as revenue needs of the carriers are concerned. As the country mobilized its industry railroad revenues rose rapidly. In addition war measures tended to reduce operating costs so that 1942 and 1943 brought the lowest operating ratios in history. Even more phenomenal was the great drop in passenger operating ratios experienced in 1943, when the increase in passenger traffic under crowded rail conditions for the first time in the history of American railroading brought the passenger operating ratios below the freight operating ratios.

IV

Unable to show that under present circumstances they require increased earnings, the carriers now urge that they need show only (1) that the rates differ, and (2) that if increased the intrastate rates would produce substantial increased revenues.

In this proceeding the Interstate Commerce Commission was called upon to decide whether the intrastate rates prescribed by Tennessee are an actual burden upon interstate commerce. The question is immediately posed, What is meant by a burden upon interstate commerce? Does it mean that the railroads simply cannot derive as much gross revenues as they would if the interstate rate level prevailed? This seems to be the Commission's conception of what is required to show a revenue burden upon interstate commerce; with meticulous care the Interstate Commerce Commission made a finding that the increased intrastate fares would result in increased gross revenues for the carriers in Tennessee.

of \$525,000. But this does not satisfy the full meaning of the phrase "burden upon interstate commerce." The full meaning of this phrase comprehends also the proposition that if the railroads do not gain these increased gross revenues of \$525,000 their need for them must be so great that they must by some means get them out of interstate passengers.

Wherein do the present record and the findings based on the record establish the burden upon interstate commerce? If the railroads had first shown the revenue needs, and next shown the expectation of getting more revenue by the higher intrastate fares, the Commission would have been called upon to determine whether the burden on interstate commerce would actually follow upon the failure to allow increased fares. But there was no evidence upon which the Commission could found the first of these findings; accordingly the determinations were not made. The bald statement of the conclusion by the Interstate Commerce Commission is of itself insufficient. Before the Commission can set aside the State's order, and override the presumption of its correctness, it must on a clear, conclusive record of evidentiary facts make the necessary findings: (1) the carriers are in need of the additional revenues; (2) the carriers are entitled to receive these revenues from intrastate passengers; (3) the increase of intrastate fares would produce the additional revenues needed by the carriers and to which they are entitled.

In the *Florida Log Case, Florida vs. United States*, 282 U. S. 194, the Supreme Court declined to sustain a finding by the Commission of undue dis-

crimination against interstate commerce; and in this connection the Court stated:

In the present instance the Commission did not undertake to establish a state-wide level of rates for the interstate transportation of logs, and in order to sustain the state-wide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) *it must appear that there are findings, supported by evidence of the essential facts as to the particular traffic and revenues, and the effect of the intrastate rates, both as existing and as prescribed, upon income of the carrier, which would justify that conclusion.* (Italics supplied.)

The Commission now construes this as imposing no duty upon it to study and appraise what the revenue needs of the carriers are, but instead as simply a ritualistic exercise designed by the Supreme Court to test the Commission's mathematical aptitude. If the Commission can obtain some statistics on the amount of traffic and count the amount of increased revenues which the increased rates would bring in to the carriers, does this satisfy the rule of the Florida Log Case in all its implications? We insist that it does not, and that the Commission is still under compulsion to inquire (1) whether the return to the carriers on their over-all business is adequate, (2) whether the return on their passenger service itself is adequate, (3) whether the cost of rendering the service, when reduced to per mile units, is greater than the fares applicable for intrastate travel. If on any one of these three bases it can be found from evidence that there is a revenue burden on inter-

state commerce, the Commission can apply the drastic remedies of Section 13; otherwise it cannot.

In the second decision of the Supreme Court in the *Florida Log Case*, 292 U. S. 1, the order of the Commission was attacked upon the ground that if the findings can be deemed to be adequate they are not supported by the evidence. In considering this exception the Court stated that when the Commission exercises its authority without error in the application of rules of law, its findings of facts "*supported by substantial evidence*" are not subject to review. In the present case it is insisted that there is a complete absence of any substantial evidence to sustain the finding of the Commission that certain revenues are *required* to enable the railroads to render adequate and efficient transportation service.

Also in *New York vs. United States*, 257 U. S. 591 (1922), as indicated in the first paragraph of the syllabus, this Court held that:

Absence of any substantial evidence to sustain a finding of the Interstate Commerce Commission material to an order adjusting rates may be relied on in a suit directly attacking the order, to which the United States and the Commission are made parties.

In the light of this principle of law, which is fundamentally sound, the following excerpt from the dissenting opinion of Commissioner Splawn (printed in full in Appendix D hereto, pages 100 to 109) takes on a deep significance:

I wish to emphasize my disagreement with finding 5 in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues *required* to

enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact, it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by Section 15a.

V

The record in this case shows conclusively that southern rail carriers are earning at excessively high rates of return before payment of federal income and excess profits taxes.

The complete absence of evidence to sustain the Commission's finding as to revenue requirements can best be demonstrated by a brief statement of what the record contains as to railroad earnings in 1942 and 1943. There would admittedly be some basis for such a finding if the carriers during these periods were earning no adequate return. But the proof in the record is that the eight major Tennessee carriers are in the aggregate earning 12.8 per cent on their investments, plus cash, materials and supplies, minus accrued depreciation and accrued amortization of defense projects, divided into *net railway operating income* before deduction of federal income taxes, the greater portion of the latter being taxes upon war profiteering.

The elaborate discussion in the brief filed on behalf of Fr  d M. Vinson, Economic Stabilization Director, in No. 592, of the rates of return of the carriers is adopted and relied upon by these appellants as a proper exposition of the facts and law applicable relative to this subject.

The order of the Interstate Commerce Commission in Docket No. 29037 was primarily and almost exclusively for the use, benefit, and advantage of the four major Tennessee railroads, these being the Louisville & Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans & Texas Pacific Railway Company, and the Nashville, Chattanooga & St. Louis Railway Company. The evidence of record in this matter demonstrates that the rate of return (before federal income taxes and minus leased road rents) of these four railway companies on their net investment in railway property used in transportation service plus cash, materials, and supplies was as follows:

| | 12 Months Ending September 30, 1943 |
|---|--|
| Louisville & Nashville Railroad | 19.9% |
| Southern Railway | 17.8% |
| Cincinnati, New Orleans & Texas Pacific Railway | 25.0% |
| Nashville, Chattanooga & St. Louis Railway | 21.5% |

(R. 323-324; 414.)

These figures alone show that these four carriers do not need the revenues from the increase of intrastate fares in order to enable them to earn an adequate and, indeed, excessive return.

VI

Rates of return after payment of federal taxes are also greatly in excess of a fair return.

If the Court prefers to examine rates of return

after income taxes, in spite of the fact that the excess profits tax law so limits net profits as to make them a poor criterion to reflect true carrier earnings, the record shows that such returns are also well in excess of a fair return. According to the carriers' exhibit, all railroads in the southern region during 1942 earned in the aggregate after income taxes 6.41 per cent. (R. 141; 343.) The four major Tennessee carriers were earning during the first eight months of 1943 at the following annual rates of return after income taxes:

| | |
|---|--------|
| Louisville & Nashville Railroad | 6.48% |
| Southern Railway | 6.6 % |
| Cincinnati, New Orleans & Texas Pacific Railway | 11.25% |
| Nashville, Chattanooga & St. Louis Railway | 8.85% |

These rates of return may be produced mathematically by using the Net Railway Operating Income of the carriers exhibited in reproduction of a report prepared by the Association of American Railroads. (R. 312; 405.) This publication shows the eight-month net income figures as follows: Louisville & Nashville Railway, \$17,636,765; Southern Railway, \$23,714,830; Cincinnati, New Orleans & Texas Pacific Railway, \$4,145,883; and Nashville, Chattanooga & St. Louis Railway, \$3,424,462. As a rate base we may properly use the Net Book Investment, plus Cash and Materials and Supplies, as follows: Louisville & Nashville Railway, \$408,000,000; Southern Railway, \$538,521,000; Cincinnati, New Orleans & Texas Pacific Railway, \$55,234,000; Nashville, Chattanooga & St. Louis Railway, \$57,956,000. (R. 323-324; 414.)

We protest against the justness of this method of computing rates of return because it has the effect

of saddling upon the consuming public the burden of paying the heavy taxes that the federal government has levied as a penalty upon the carriers for war profiteering.

The discussion by the Supreme Court of Michigan in the case of *Detroit vs. Michigan Public Service Commission*, 308 Mich. 706, 14 N. W. (2d) 784, 785 (1944) is pertinent to this issue; the opinion is most ably considered and to be commended to all regulatory agencies.

The Court said:

In the instant case the question narrows down to whether the Commission in passing upon a petition to reduce the rate charged the consumer by the public utility should consider and exercise its discretion in respect to the exclusion in whole or in part of "excess profits" of the character hereinabove noted . . .

In the instant case the Commission disclaims that it possesses any power to consider this matter. It thus completely ignores its discretionary authority to exclude those items from public utility operating expenses which place unnecessary burdens upon the consumer. Obviously in so doing the Commission failed to balance investor and public interests.

The Commission arrived at its conclusion in the instant case upon the erroneous assumption that it was wholly without power to exclude from its consideration in fixing the rate to be charged to the consumer the undisputed fact that the presently approved rate produces "excess profits of approximately \$8,000,000 on which there is a 90 per cent excess profit tax." Under such circumstances it cannot be said that a fair and adequate hearing was had before the Commission.

Without discretionary power to exclude any and all unnecessary elements of expense in determining a just and reasonable rate, the Michigan Public Service Commission would be an impotent body. It could not have been the intent of the Legislature that the Commission should lack any necessary power to fix reasonable rates, and the Commission should not be permitted to declare itself impotent. It clearly possesses such discretionary power, and that power should be exercised.

A like principle has been approved in a number of other authorities including

Re Washington Gas Light Co., 46 P. U. R. (N. S.) 1, 11.

Panhandle Eastern Pipeline Co. vs. Federal Power Commission, 143 F. 2d 488.

South American Rate Order, F. C. C. (report dated June 22, 1943).

VII

Passenger operating ratios are lower than at any time in history and passenger traffic, both interstate and intrastate, is today contributing a larger proportion of rail profits than is freight traffic.

In still another way the earnings of the carriers may be shown. Passenger operating ratios represent the best criterion as to the earnings of the carriers from passenger service alone. For many years these ratios were invariably deficit figures, and passenger service was supported by freight earnings. Today this experience is completely reversed, and passenger operating ratios are lower than freight. The ratios for the four carriers in the Tennessee case are as follows:

| | Freight, 1942 | Passenger, 1942 | Freight Estimates for 9 months of 1943 | Passenger Estimates for 9 months of 1943 |
|---|---------------|-----------------|--|--|
| Louisville & Nashville | 55.9 | 72.0 | 57.1 | 52.5 |
| Southern Railway | 55.1 | 57.4 | 54.6 | 47.1 |
| Cincinnati, New Orleans & Texas Pacific | 51.2 | 62.1 | 52.4 | 52.8 |
| Nashville, Chattanooga & St. Louis Railway | 62.0 | 70.1 | 64.2 | 58.9 |

(R. 323-324; 411.)

VIII

The unit cost of passenger traffic in coaches is far less than the intrastate fares, thus demonstrating that if all fares, intrastate and interstate, were on the intrastate level, the carriers would still be deriving an adequate return.

In the second place it may be admitted that the rate of return in and of itself may not be sufficient to show that the intrastate fares are producing their fair share of the revenues. If the State-made fares are below the cost of rendering the service, they would be a burden upon interstate commerce in spite of the fact that the carriers were making a fair return. In other words, we emphasize that we are not insisting that the high returns of the carriers on their over-all traffic would give the States the power to order that intrastate traffic be carried free of charge. The States must still show that their fares pay more than the cost of rendering the service and contribute to the fair return of the carriers.

But in the present record it is proved by indisputable evidence, introduced by the carriers themselves, that the revenues required by all Tennessee

railroads to defray the expense of transportation in 1942 amounted to 1.22 cents per passenger mile or less, as compared with the intrastate fare of 1.65 cents per mile. The expense per passenger mile in *coaches* of the major railways in the South is shown by a computation set out in the appendix to the O. P. A. petition for reconsideration to be .68 of one cent per mile for 1943. (R. 501.)

For 1942 the revenue per passenger mile earned in coaches by railroads operating in Tennessee is shown by exhibits introduced by the carriers. (R. 141; 348.) By applying 1942 passenger operating ratios (R. 141; 346) to these revenues, the cost per mile in coaches can be approximated. This calculation produces the following results:

| | |
|---|--------|
| Louisville & Nashville Railroad | 1.136c |
| Southern Railway | .912c |
| Cincinnati, New Orleans & Texas Pacific Railway | 1.015c |
| Nashville, Chattanooga & St. Louis Railway | 1.078c |

For 1943 the comparable figures are not in the record. However, we do know that traffic was still trending upward, this having a distinct tendency to reduce unit costs, and at the same time reduce passenger operating ratios. Revenue passenger miles per car mile increased in 1943 on the Southern Railway from 25.25 to 31.89; on the Louisville & Nashville from 21.11 to 33.83; on the Cincinnati, New Orleans and Texas Pacific from 27.56 to 29.83; and on the Nashville, Chattanooga & St. Louis from 25.16 to 34.86. (R. 141; 356.)

The necessary inference to be drawn from this is that cost per mile in coaches throughout 1943 was considerably less than one cent. Applying the 1943 passenger ratios of these four carriers (R. 323-324;

411) to the revenues earned per passenger mile in coaches during 1942 (R. 141; 348) (these being fairly stable figures) gives a cost in coaches having a range on the various roads per passenger mile from .944 cent high to .752 cent low. Though the methods pursued are not statistically exact, they form a good common-sense basis for judging the question of the expenses of coach travel per passenger mile. Any figure which can be produced by any of these methods is far less than 1.65 cents per passenger mile that the Tennessee Commission has prescribed as a proper fare.

IX

In the absence of evidence of any need on the part of carriers for increased revenues the order of the Interstate Commerce Commission was an unconstitutional usurpation of the power of the State, in contravention of the Tenth Amendment of the Constitution of the United States.

In the face of this evidence it is not surprising that the District Court conceded that the facts of record establish "the nonexistence of any need" for "increased revenues." (R. 1359.) By the same token, however, the finding of the Interstate Commerce Commission that the State-made rates constitute a burden upon interstate commerce is arbitrary and wanton, not made upon substantial evidence, but in the face of the undisputed evidence to the contrary. It follows that the Interstate Commerce Commission exceeded its lawful powers under the Commerce Clause of the Constitution, and its order contravenes the Tenth Amendment to the Constitution of the United States.

Counsel for the Interstate Commerce Commission

has urged the point that the three States are insisting that there is no need for additional revenues on the part of the carriers and that this is tantamount to an insistence that Section 13 is to all effects and purposes suspended during periods of railroad prosperity. In an appeal to *reductio ad absurdum* he asks whether we contend that Section 13 is suspended during times of carriers' prosperity.

The answer is, Yes; that is exactly our contention; it is carrier prosperity and high earnings which operate to suspend Section 13. When intrastate rates are producing such large revenues that the carrier is making an ample return and there can be no burden on interstate commerce, the Interstate Commerce Commission has no Constitutional power to invoke the provisions of Section 13. In periods of exorbitant railroad earnings a revenue burden against interstate commerce simply cannot exist, and, to use the happy phrase suggested by counsel for the Interstate Commerce Commission, *this suspends Section 13*.

To hold otherwise would simply mean that the Commission can set aside State rates on a purely arbitrary, whimsical, and discretionary basis, if they differ from the interstate rates, whether there is any burden upon interstate commerce or not. In a deeper sense, the fact that the Commission has taken this position must be taken as a tacit admission that there was no evidence before the Commission that Tennessee railroads required \$525,000 of additional intrastate revenues in order to enable them to adequately serve the transportation needs of the nation.

Section 13(4) is a statute which requires strict construction. The Commission should observe the

literal meaning of the words used. The statute does not proscribe all discrimination, but only such as is undue, unreasonable, and unjust. To require railroads to carry intrastate commerce at rates lower than those for interstate commerce at a time when the railroads are suffering from depressed revenue is undue, unreasonable, and unjust discrimination. To require them to carry intrastate commerce at less than its cost, including a fair return, also works an injustice upon the carriers, and this establishes the undueness and unreasonableness of the rates. On the other hand, if the railroads are making an adequate return, and if they are receiving from the intrastate rates the full cost of rendering the service, plus a fair contribution to the fair return, while there may be a discrimination, it is neither undue, unreasonable, nor unjust as no rights of the carrier are infringed. There is no element of injustice of which the carrier, as an instrument of interstate commerce, can complain. This fundamental difference between a mere discrimination and an unjust discrimination was completely overlooked by the District Court in its discussion of discrimination. (R. 1359.)

If Section 13 must be construed in the manner insisted by carriers, it is manifestly unconstitutional. The Supreme Court has held in *Houston E. & W. T. R. Co. vs. United States*, 234 U. S. 342 (1914), that Congress in its regulation of intrastate commerce is limited to those cases where the intrastate rates would injure, impede, hinder, or restrain interstate commerce by placing obstructions or burdens upon it. The Supreme Court said:

Congress is empowered to regulate, that is, to provide the law for the government of interstate commerce; to enact all "appropriate legislation" for its "protection and advancement" . . . ; to adopt measures "to foster, protect, control, and restrain." . . . Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rules, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the nation, would be supreme within the national field. . . .

Likewise in the case of *Wisconsin Railroad Com-*

mission vs. Chicago B. & Q. R. Company, 257 U. S. 563, the Supreme Court declared:

Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitations of the earning power of the interstate commerce system in doing state work.

Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

Where the earning power of the interstate commerce system is in no jeopardy because of the high earnings of the carriers Section 13 may not be invoked; and if, on the other hand, the section is to be construed as requiring the Interstate Commerce Commission to set aside State rates upon the showing of a mere disparity, and without finding any revenue requirements of the carriers upon substantial evidence that such needs exist, the section is clearly unconstitutional, and contravenes the Tenth Amendment to the Constitution of the United States.

However, it is our insistence that the statute does not require such action upon the part of the Interstate Commerce Commission; that Section 13 is constitutional; but that the action of the Interstate Commerce Commission in setting aside State rates without due regard for the requirements of the stat-

ute is an unconstitutional action of the United States taken under a constitutional statute.

X

The evidence of record establishes that the standards of through service on the railroads, predominantly interstate, are of superior quality to the standards of local service, predominantly intrastate, and that intrastate passenger transportation in Tennessee, on the average, is of an inferior grade to the service offered interstate passengers, on the average.

Both the Commission and the Court completely ignored the evidence as to the circumstances and conditions of intrastate travel in Tennessee. Their findings are directly opposite to the facts of record. The types of trains involved in a state-wide case in the South, and particularly in Tennessee, are of very unequal types. The Railroad and Public Utilities Commission of Tennessee, which commands a far more intimate and expert knowledge of local travel conditions in Tennessee than the Interstate Commerce Commission can possibly claim, made findings in its order of August 30, 1943, Docket No. 2535, which show that it considered the circumstances and conditions of intrastate rail service distinctly inferior to those of interstate service. (R. 51-52.)

This record incontrovertibly discloses that the standards of through service, predominantly interstate, are of an entirely different quality from the standards of local service, predominantly intrastate. The aspect of this matter which has the greatest significance is that the carriers in the South, in the very period in which they have made the greatest strides in improving their service, in providing luxurious

passenger equipment, catering to the comfort of the through travelers, have permitted their local service to progressively decline. The abandonment of passenger stations is one index of this deterioration. (R. 281-282.)

Thirty years ago there was not a great deal of difference between the facilities offered to the interstate and intrastate passenger. Both rode the same coaches in equal numbers or equal proportions. But the record conclusively shows that in Tennessee today the proportion of interstate travelers who are able to ride the *de luxe* air-conditioned reserved seat trains is far greater than the proportion of intrastate travelers; on the other hand, the proportion of intrastate or local passengers who have to ride the common low-grade and in many cases substandard coaches, completely destitute of modern comforts and conveniences, is far greater than the proportion of total interstate or through passengers. (R. 287-288.)

The plaintiffs do not concede in this case that standards of transportation offered intrastate passengers in the State of Tennessee on the average conform to the standards of service offered to interstate passengers on the average. The evidence in this record clearly shows that there is a pronounced distinction between the facilities used predominantly by interstate travelers in the State and the facilities used predominantly by intrastate travelers in the State. The following synopsis of this evidence clearly demonstrates that the Commission is here dealing with two entirely separate and distinct classes of service.

Passengers are free agents; therefore, the trans-

portation of passengers is quite different from the transportation of freight. The success or failure of the carrier's passenger business is to a large extent dependent upon its attitude in catering to the traveling public, or to what extent the following passenger transportation fundamentals are made available to the traveling public—namely, safety, speed, air conditioning, modernized equipment, economy in travel cost, accessibility, hospitality, convenience, comfort, frequency, reserved accommodations, luxurious service, buffet and tavern service (R. 288), all of which are referred to in the conclusions of the Federal Coordinator of Transportation on Passenger Traffic in his report of June, 1936.

Rail carriers are now to a limited extent pooling their passenger traffic. Three streamlined coach trains are now operated between Chicago, Illinois, and Miami, Florida, one train each way daily. On December 1 the "Southwind" leaves Chicago over the Pennsylvania Railroad; on December 2 the "Dixie Flagler" leaves Chicago over the Chicago and Eastern Illinois Railroad; on December 3 the "City of Miami" leaves Chicago over the Illinois Central Railroad. Coach tickets held by passengers for passage on either one of these coach trains can be exchanged at the option of passengers for passage over either of the other coach trains, which is an extra convenience. (R. 260.)

The route of the "City of Miami" through Tennessee is shown by exhibit. It is a Diesel-powered all-coach, streamlined train and carries no Pullmans. This train is equipped with all the latest improvements and conveniences offered to the public, such as *de luxe* reclining seats, reserved at no extra

cost, complete air conditioning, radio, stewardess, registered nurse, exclusive coach for women and children, tavern lounge, observation car, all for 2.2 cents per mile and no extra fares. The dining car service advertises that inexpensive meals are served. The speed through Tennessee is 51 miles per hour. Schedule stops are arranged so that this train may carry intrastate passengers in Illinois, Georgia, and Florida, and it handles interstate passengers into, out of, and through Tennessee. *However schedules do not allow passage of any intrastate passengers on this train in Tennessee.* (R. 312; 367.)

The route of the "Southwind" through Tennessee is also shown by exhibit. It is a streamlined all-coach train, has Pennsylvania Railroad equipment and dining car service, complete air conditioning, individual reclining chairs which must be reserved in advance and there is no extra charge. Regular stops are so arranged that it handles intrastate passengers in Alabama, Florida, and Georgia. It handles interstate passengers into, out of, and across Tennessee, *but carries no intrastate passengers in Tennessee.* It travels at an average speed of 51.22 miles per hour through Tennessee. (R. 312; 368.)

The route of the "Dixie Flagler" through Tennessee is also shown. It is a streamlined all-coach train; it has complete air conditioning individual reclining chairs which must be reserved at no extra cost; and regular coach fare rates apply. It has an average speed of 44.6 miles per hour in Tennessee. Stops are so arranged and published that this train may carry intrastate passengers in Illinois, Indiana, Georgia, and Florida. It also carries interstate passengers into, out of, and through Tennessee, *but its*

schedules are so arranged as to permit no travel thereon by intrastate passengers in Tennessee. (R. 312; 368.)

The President of the Louisville & Nashville Railroad takes such pride in these *de luxe* coach trains, the "Southwind" and "Flagler," that he refers to them in his 1942 annual report to stockholders in the following manner:

The streamlined coach trains, the "Southwind" and the "Dixie Flagler," referred to in previous reports, continue popular. Their particular appeal to patrons is economy in travel costs, fast schedules, high type coach conveniences, and provisions for seat reservation. (R. 312; 391.)

The route of the "Pan-American" through Tennessee is also shown. It operates over the Louisville & Nashville Railroad between Cincinnati, Ohio, and New Orleans, Louisiana. Its equipment consists of air-conditioned coaches with individual reclining chairs at no extra cost, Pullmans, and dining cars. *Its stops are so arranged that its facilities are not available to intrastate passengers in Tennessee.* It handles interstate passengers into, out of, and through Tennessee, and intrastate passengers in Kentucky, Alabama, and Mississippi. Its speed through Tennessee is 43.5 miles per hour. (R. 312; 370.) This train can be heard every afternoon as it passes WSM Broadcasting Station at Nashville, Tennessee, over which it is advertised as the "Louisville & Nashville Railroad's crack passenger train." (R. 264.)

It is in evidence that the Nashville, Chattanooga & St. Louis Railway serves its passengers on 33.38

per cent of its entire mileage with mixed freight and passenger trains, while 38.54 per cent of this carrier's entire Tennessee mileage is served by mixed freight and passenger trains. (R. 312; 371; 251; 361; 362.)

The Nashville, Chattanooga & St. Louis Railway operates cafe-coach cars on its line between Memphis and Nashville, Tennessee, all seats reserved. These reserved seats are available to passengers upon payment of the cafe-coach seat fare which is an extra charge amounting to 25 cents up to 75 cents over and above the regular coach fare. (R. 312; 387-388.)

The Nashville, Chattanooga & St. Louis Railway operates six trains each way between Chattanooga and Nashville, Tennessee. (R. 312; 572-584.) Trains 11 and 12, the "Dixie Flagler," are streamlined interstate coach trains, having no intrastate service. Trains 90 and 91, 94 and 95, known as the "Dixie Flyer," and trains 3 and 4, 92 and 93, known as the "Dixie Limited," were described in the testimony as being particularly, primarily, and predominantly interstate trains. (R. 266.) Respondents referred to most of these trains as "our through Florida trains" and acknowledged they were predominantly and primarily interstate trains. (R. 109.) Trains 5 and 6 make all stops in Tennessee and take care of the intrastate passengers. All trains between Chattanooga and Nashville cross the Cumberland Mountains at Cowan, Tennessee. There are unusually difficult conditions incident to the movement of passenger trains over this mountainous country where it is necessary to maintain helper service, consisting of a mountain engine, engineer,

fireman, (and conductor. (R. 108; 115-117.) This helper service is necessary for all through passenger trains. (R. 115.) As a general rule, trains 5 and 6 go over the mountain without the use of a helper. (R. 117.) The only intrastate passengers that are carried over the mountain at Cowan on a through train must be on trains 3 or 4, and must get off the train at Sherwood at 12:10 A.M., or board the train at Sherwood at 3:07 A.M., after flagging the train and inducing it to make a special stop. No part of this helper service expense is correctly chargeable to intrastate passenger transportation in Tennessee. (R. 266-267; 312; 380.)

It is shown in detail by exhibits that 302.16 miles of line, or 38.54 per cent of the mileage of the Nashville, Chattanooga & St. Louis Railway in Tennessee is served by mixed trains. A "mixed train" is a euphemistic term to describe an outmoded passenger coach on the rear of a freight train, which coach in addition to serving as a passenger coach is used by the train crew in lieu of a caboose. Some of these trains haul from 28 to 30 freight cars, which makes riding quite rough in the passenger coach on the rear. These trains consistently operate from 30 minutes to three hours late. The Columbia Branch and the Sparta Branch trains are lighted by electricity, others by kerosene lamps. All coaches are heated by coal stoves. Toilet facilities are unsanitary, no drinking cups are provided, and generally the windows, floors, and seats are in need of cleaning. All coaches are old style with open vestibules. These trains serve some of Tennessee's most thriving communities, such as Shelbyville, McMinnville, Sparta, Columbia, Lewisburg, Fayetteville, Win-

chester, and Whitwell, having populations ranging from 2,500 to 10,579. (R. 251; 362; 312; 383; 234-245.)

Inasmuch as coaches are used in lieu of a caboose on these mixed trains, passengers are handled at no extra expense to carriers. (R. 290.)

All of these evidentiary facts prove conclusively that relative transportation conditions within the State of Tennessee and in the same general section of the country are not substantially similar. Intrastate passenger transportation in Tennessee, on the average, is of an inferior grade to that offered interstate passengers on the average.

The District Court dismissed this evidence as of slight consequence. It recognized that the streamlined de luxe trains offer the traveling public higher standards of service than other regular or local trains. The Court followed this statement with the finding that "... in the great majority of cases the streamlined or de luxe trains are available to and actually carry both interstate and intrastate passengers. In a few instances their schedules do not provide for but one regular stop within a State, which prevents the transportation of intrastate passengers within that State, but such a schedule is apparently necessary in order to provide that type of service, and considering both that fact and the relative insignificance of this type of transportation it can be largely disregarded in making the general finding referred to." (R. 1358.)

These findings are completely without the bounds of the record. In the first place, the statement that a majority of the streamliners are available to and actually carry interstate and intrastate passengers

is completely foreign to the evidence introduced in the Tennessee case. But five streamliners are mentioned in rail service in Tennessee, these being the "City of Miami," the "Southwind," the "Dixie Flagler," the "Pan-American," and the "Tennessean" (Southern Railway). The record clearly establishes that four out of five of these trains offer no intrastate service in Tennessee whatever, while the record is completely silent as to whether the "Tennessean" carries interstate or intrastate passengers or both. With this state of the record that finding of the Court is purely gratuitous.

The finding that the air-conditioned, streamlined trains are relatively insignificant when compared with the whole body of rail transportation also takes the Court outside of the record. The record does not contain evidence as to how many trains operate on schedules in Tennessee. In the absence of this evidence the finding of the Court that five streamliners are relatively insignificant in a State like Tennessee must have been derived from the Court's private impression that a vast number of trains operate in the State. How reliable this impression may be we have no way of knowing.

The best guide to the relative importance of streamlined transportation, in the total absence of exact proof, is the inference to be gained from the timetable of the Nashville, Chattanooga & St. Louis Railway exhibited in the record. (R. 312; 373-384.) Page 15 of this timetable (R. 380) shows the scheduled service on the main line of the carrier. There are six schedules north and six south. One of these in each direction is the "Dixie Flagler," Numbers 11 and 12, the streamliner. Whether these schedules

represent a large or small proportion of total traffic over the main line would depend on many factors not in the record, such as length of trains, whether operated in one or more sections, and frequency of schedules. As an estimate or guess the Court might have decided from this timetable that this streamliner carried something less than 15 per cent and more than 7 per cent of the traffic on the main line.

The record also shows that the Nashville, Chattanooga & St. Louis Railway, having 43 per cent of the total rate disparity (\$240,215 out of a total of \$556,280) (R. 141; 341), has but one streamliner, while the Louisville and Nashville Railroad, with 20 per cent of the disparity (\$115,718 out of the total) (R. 141; 341), has two streamliners, the "Pan-American" and the "Southwind" (R. 312; 391). Considering these facts it should be inferred that the relative significance of the streamliners on this carrier is much higher than on the N. C. & St. L., possibly transporting 25 per cent or more of main line traffic.

In the face of these inferences, though we do not claim that they are wholly reliable; the finding of the Court is obviously improper.

The Court also referred to the specific findings of the Interstate Commerce Commission as "general findings." We respectfully submit that findings of fact are not general, but specific, and based on exact evidence, and that they are not approximately correct, but are either true or false. If we could establish (and the Court says we did) that intrastate passengers do not have the opportunity to ride with interstate passengers on *one single train* it would establish the falsity of the Commission's finding

Number 4 (Appendix B, pages 93 and 94). Yet the record clearly shows that there are four trains which are interstate 100 per cent, and these are four of the five finest trains operating in the State.

In what other way could a litigant proceed in order to show the Commission that conditions and circumstances of intrastate travel are inferior to those of interstate travel? Is it necessary that he prove that there is a complete severance of intrastate from interstate carriage? It is most respectfully urged that the record in this case is adequate to show the inferiority of the average intrastate passenger's lot in Tennessee to that of the average interstate passenger.

XI

There is no evidence in the record justifying the Commission in finding that the interstate fares are just and reasonable, such a finding being a necessary prerequisite to action under Section 13(4).

Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, was a nation-wide investigation of all rates, passenger and freight, throughout the country. It was conducted as a result of a petition filed by class one railroads December 13, 1941, requesting that blanket horizontal increases be granted as an emergency measure to enable the carriers to meet the anticipated increases in costs due to the war. The petition requested as to passenger fares only:

A uniform increase of 10 per cent in all fares, . . . (emphasis supplied).

and qualified this shortly thereafter with the phrase "as published in passenger tariffs." 248.I. C. C. 550.

Pursuant to investigation and hearing a 10 per cent increase both interstate and intrastate was allowed on passenger fares as published in the existing tariffs throughout the South and this increased coach fares from 1.5 cents per mile to 1.65 cents per mile.

The published report of the Commission, 248 I. C. C. 545, shows clearly that the investigation there conducted was on a nation-wide basis and was not the type of investigation which would have been made in order to effect major rate adjustments of fares having varying levels in different regions of the country. In an investigation of this type it was natural that the parties did not present evidence directed to the different levels which prevail; no opportunity to do so was afforded them, and the issues were so drawn that if it had been attempted the evidence would have been refused admission.

On July 14, 1942, months after the decision in Ex Parte No. 148, the railroads operating in Southern Passenger Association territory filed a petition in Docket No. 26550, *Passenger Fares and Surcharges*, asking that the Commission modify its findings and outstanding orders in that proceeding to the extent necessary to enable the railroads to publish tariffs increasing coach fares from 1.65 cents to 2.2 cents per mile. By order dated August 1, 1942, a copy of which has been filed in the record of the instant case, the Commission denied the petition filed in Docket No. 26550, thus refusing to modify the findings formerly made.

Having denied the petition, the Interstate Commerce Commission in the same order, and upon the same sheet of paper, recited that the order would

be entered in Ex Parte No. 148, and provided inconsistently that the order of January 21, 1942, be modified so as to authorize the railroads in the South to apply the increase of 10 per cent approved in said order to a passenger coach fare of 2 cents per mile on the lines of said railroads. By this circuitous route interstate coach fares were increased in the South from 1.5 cents per mile to 2.2 cents per mile, a $46 \frac{2}{3}$ per cent increase, in a proceeding in which the petitioners had asked for a 10 per cent increase.

The case of *Arizona Grocery Company vs. Atchison, Topeka & Santa Fe Railway Company*, 284 U. S. 370, 52 S. Ct. 183, 76 L. ed. 348 (1932) is the leading case by this Court holding that a determination by the Interstate Commerce Commission as to a particular rate makes that rate *per se* just and reasonable. Accordingly, it may be argued that Ex Parte 148, *Increased Railway Rates, Fares, and Charges, 1942*, established the reasonableness of the interstate fares of 2.2 cents per mile. However, the Commission in its opinion, 248 I. C. C. 545, 613, expressly excluded this result by holding specifically:

Rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of *Arizona Grocery Co. vs. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370.

Consequently the finding of the District Court that finding No. 1 of the Commission—viz., that the interstate fares of 2.2 cents per mile are reasonable—is supported by the evidence, said evidence consisting of the investigation made in Ex Parte 148, is erroneous. (R. 1355-1356.) The Court traced the history of the proceedings in Ex Parte 148 and rested its finding upon the assumed fact

that Ex Parte 148 had established the reasonableness of the interstate fares. The finding is directly contrary to the facts.

It is submitted that the procedure followed by the Commission was made without supporting pleadings, without supporting proof, and without notice to the parties before the Commission, and most certainly without notice to the parties in the present case that such increases were contemplated. It will, therefore, be seen immediately that the Commission was enabled to accomplish the increase of interstate fares without the necessity of making any finding whatever as to the reasonableness of such fares; in fact, it was able to dispense entirely with any proof as to the reasonableness of the interstate fares.

In the present case involving Tennessee intra-state fares, the Commission supplied the deficiencies in proof by drawing upon former decisions of the Commission and adopting, without new evidence, findings made in them. It went back to its decision in Docket No. 26550 for the finding that in 1936 2 cents per mile was a reasonable coach fare throughout the country, without prejudice to the maintenance of lower fares in certain of the major districts of the country, of which the South constitutes one, and with no further evidence of reasonableness grafted it upon the order in Docket No. 29037. It predicates its finding of reasonableness of the interstate fare in the present case upon the fact that the 2.2 cents fare was established in Ex Parte 148, an investigation in which the issue was whether the railroads were entitled to a 10 per cent increase, and no opportunity was afforded the petitioners to resist an increase amounting to nearly 50 per cent.

The effect of the action of the Interstate Commerce Commission is not beneficial to the national economy, inasmuch as it is an administrative nullification of a justified regulatory procedure, in the insulated chambers afforded by the several States, without a proper regard for the rightful concern of local interests in local transportation facilities.

The record in this case, taken as a whole, can bear but one interpretation, which is that the desire of the Commission for uniformity in fare structure is so powerful that it was willing to assert authority over the intrastate fares upon the most slender factual grounds. It was intolerable to the Commission that forty-four States should have the 2.2 cents fare, while four States alone stood out for the 1.65 cents fare. However desirable in the social and economic sense nation-wide uniformity of passenger fares may be, it does not amount to a legal justification for overriding State authority.

There is also a social and economic benefit to be drawn from the reverse of uniformity. The individual States may contribute something to the national economy by the very fact that they do not all perform in the same patterns. Throughout an entire era of our history the States were circumscribed in their social experimentation by judicial restrictions stemming from a too narrow interpretation of the Fourteenth Amendment.

In one of his forty-three dissenting opinions to this Court's action in striking down State action because of the Fourteenth Amendment, Mr. Justice Holmes emphasized the importance of allowing the States to continue to experiment in fields of business

regulation. He closed his dissent in *Truax vs. Corrigan*, 257 U. S. 312, 344, 42 Sup. Ct. 124, 66 L. ed. 254, 268. (1921) with the following statement:

... There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

The foregoing was quoted and discussed in a lecture by Mr. Justice Frankfurter (prior to his appointment to this Court) which has been published with two others under the title: *Mr. Justice Holmes and the Supreme Court*.¹ After commenting that during Mr. Justice Holmes' last decade as a member of this Court more than a third of State legislation assailed under the Fourteenth Amendment "fell foul of the due process clause," Mr. Justice Frankfurter said:

Such judicial control of the individualism of the States is an aspect of centralization too often overlooked. It is socially costly and often capricious—costly, because judicial nullification based on unexamined assumptions of policy stops experimentation at its source and bars needed increase to the fund of social knowledge through tests of trial and error; capricious, because it so often turns on the fortuitous circumstances which determine a majority decision, particularly in matters of fact and opinion not peculiarly within the professional competence of lawyers. Against this dangerous use of

¹Harvard University Press. Cambridge, 1938.

judicial power, Mr. Justice Holmes directed the power and originality of his pen in the myriad variety of instances which presented the same central issue.²

It may be respectfully urged that there is no more virtue in the veto against State action by fiat of an administrative agency such as the Interstate Commerce Commission than there is by a judicial body. In either case the individualism of the States is checked and bars to the increase of social knowledge through trial and error are erected.

The Interstate Commerce Commission permitted the railroads through eleven years of depressed business to experiment with coach fares of 1.5 cents per mile; yet when in years of prosperous business conditions and high earnings four States seek to continue this experiment under more favorable circumstances, the Interstate Commerce Commission pronounces this effort unlawful, burdensome, and inimical to the national commerce. This action by the Commission has so little foundation in the evidence that it should be condemned as an unwarranted and arbitrary invasion of State authority, and set aside by this Court.

When the Commission extended federal control over Tennessee intrastate coach fares upon such a slender justification, it violated both the spirit and the letter of the pronouncement of this Court in the recent case of *City of Yonkers vs. United States of America*, 320 U. S. 685, 88 L. ed. 241, 64 Sup. Ct. R. 327 (1944), as follows:

We recently stated that the extension of federal control into these traditional local domains

²Op. cit., p. 88.

is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." *Palmer vs. Massachusetts*, 308 U. S. 79, 84, 84 L. ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (NS) 34. In the application of the doctrine of the *Shreveport case*, this Court has required the Commission to show meticulous respect for the interests of the States. It has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the federal power must clearly appear." *Florida vs. United States*, 282 U. S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119.

In this case the Court also said:

... Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (*Illinois Commerce Commission vs. Thomson*, 318 U. S. 675, 87 L. ed. 1075, 63 S. Ct. 834) as by improper findings.

It is accordingly urged that the order of the Interstate Commerce Commission should be enjoined, set aside, and annulled.

CONCLUSION

For the foregoing reasons, it is plain that the judgment below, if sustained, will impair or destroy State regulation in important respects in disregard of the purpose of Congress as expressed in Section 13(4) of the Interstate Commerce Act, and in contravention of the Tenth Amendment of the United States Constitution. The record contains no facts to justify a drastic action against the sovereignty of the States here involved, or upon which they should stand convicted of using their authority to impede, burden, cripple, or destroy interstate commerce.

We urge that the order of the Interstate Commerce Commission be set aside and held for naught, and that the decree of the District Court be reversed, with directions to that Court to enter a decree permanently enjoining the enforcement of the said order of the Commission.

Respectfully submitted,

LEÓN JOUROLMON, JR.,
Counsel for State of Tennessee
and the Railroad and Public
Utilities Commission of the
State of Tennessee.

Dated at Nashville, Tennessee,
April 2, 1945.

APPENDIX A
INTERSTATE COMMERCE ACT

Sections 13 (4) and 15a (2).

Section 13 (4). Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are pre-

scribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

APPENDIX B**FINDINGS OF FACT OF THE INTERSTATE COMMERCE
COMMISSION, DOCKET NO. 28963, ALABAMA
INTRASTATE FARES, MARCH 25, 1944**

1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from, and through those respective States on the other, are substantially similar.

4. Interstate passengers in these States travel in the same trains, generally in the same cars, with intrastate passengers, but are forced to pay higher

fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

5. Respondent's revenues under the lower intrastate fares are less by at least \$725,000 per annum in Alabama, \$500,000 in Kentucky, \$525,000 in North Carolina, and \$525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation service.

6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of

respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State.

APPENDIX C**FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE DISTRICT COURT
ENTERED AUGUST 3, 1944
FINDINGS OF FACT**

1. On June 1, 1936, the Interstate Commerce Commission found in a proceeding then duly pending before it that the basic fare of 3.6 cents per passenger mile on interstate passenger coach travel in the territory south of the Ohio and Potomac Rivers and east of the Mississippi River was unreasonable to the extent that it exceeded 2 cents per passenger mile. Pursuant to said findings the basic interstate coach fare was on June 1, 1936, reduced from 3.6 cents to 2 cents per passenger mile.

2. The Interstate Commerce Commission by order of January 21, 1942, in a proceeding properly pending before it authorized an increase of 10 per cent in the interstate passenger coach fares effective February 10, 1942, thus raising the interstate passenger coach fare to 2.2 cents per passenger mile.

3. Shortly after October 1, 1942, the southern railroads filed with the Public Service Commission of Alabama, the Railroad and Public Utilities Commission of Tennessee, and the Railroad Commission of Kentucky certain traffic schedules to become effective December 1, 1942, designed to raise the intrastate passenger coach fares in the respective States to the level of the corresponding interstate fares. Each State Commission held an investigation and hearing and in each instance found that the evidence presented did not justify the increase sought. The proposed increases were denied in each instance.

4. On March 17, 1943, the railroads operating in Alabama filed with the Interstate Commerce Commission a petition seeking an investigation under Sections 3, 13, and 15 of the Interstate Commerce Act of intrastate passenger coach fares in Alabama. On June 24, 1943, the Kentucky railroads instituted similar proceedings before the Interstate Commerce Commission for authority to permit increases in Kentucky intrastate passenger coach fares, and at approximately that time the Tennessee railroads also instituted such proceedings with respect to the intrastate coach fares in Tennessee. The Interstate Commerce Commission consolidated all the proceedings before it, and after taking evidence and holding hearings issued its report and findings on March 25, 1944, under the style and docket number of Alabama Intrastate Fares No. 28963. The Commission found that the interstate coach fares in effect in Alabama, Kentucky, and Tennessee were just and reasonable; that the intrastate coach fares in said States were lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory; that the conditions affecting transportation of passengers in coaches within these three States, intrastate on the one hand, and interstate to, from, and through these States on the other, were substantially similar; that interstate passengers in these States traveled in the same train and generally in the same cars with intrastate passengers, but were forced to pay higher fares than the intrastate passengers for like service; that the railroads' revenues under the lower intrastate fares were less by at least \$725,000 per annum in Alabama, \$500,000 in Kentucky, and \$525,000 in Ten-

nessee than they would be if those fares were increased to the level of the corresponding interstate fares, and that traffic moving under these lower intrastate fares was not contributing its fair share of the revenues required to enable the railroads to render adequate and efficient transportation service; that the maintenance of intrastate coach fares in these States to the extent that such fares are on a lower level than the corresponding interstate fares caused and would cause undue, unreasonable, and unjust discrimination against interstate commerce, and that this unlawfulness should be removed by increasing the intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by the railroads to, from, and through such states.

5. Thereafter by order dated May 8, 1944, in said consolidated proceedings the Interstate Commerce Commission ordered the railroads operating in Alabama, Tennessee, and Kentucky to cease on or before July 1, 1944, from practicing the unjust discrimination found by it to exist, and thereafter to maintain and apply passenger fares for intrastate transportation in the respective States on bases no lower than the passenger fares then maintained and applied by the railroads for like accommodations in interstate transportation to, from, and through the respective States. The effective date of this order was thereafter postponed until August 15, 1944.

6. The said findings of the Interstate Commerce Commission in Alabama Intrastate Fares No. 28963 are supported by substantial evidence.

CONCLUSIONS OF LAW

1. The order of the Interstate Commerce Commission of May 8, 1944, which is sought to be set aside in these proceedings, is an authorized and valid order, correctly applies the proper principles of law to the facts so found by it and approved in these proceedings, and is not arbitrary and unreasonable.

2. The Interstate Commerce Commission properly required on the evidence before it and its findings of fact substantially supported by said evidence that the railroads operating in Alabama, Tennessee, and Kentucky establish and maintain intrastate coach fares for passengers on bases no lower than the existing interstate fares.

Wisconsin Ry. Commission vs. C. B. & Q. R. R. Co., 257 U. S. 563.

New York vs. United States, 257 U. S. 591.

United States vs. Louisiana, 290 U. S. 70.

Florida vs. United States, 292 U. S. 1.

Illinois Commerce Commission vs. United States, 292 U. S. 474.

Vinson vs. Washington Gas Co., 321 U. S. 489.

Interstate Commerce Commission et al. vs. The City of Jersey City et al., U. S. Supreme Court, May 29, 1944.

3. The injunction prayed for in each of the three actions is denied and the proceedings should be dismissed in each instance.

APPENDIX D**DISSENTING OPINION OF COMMISSIONER SPLAWN
IN DOCKET NO. 28963, ALABAMA INTRASTATE
FARES, MARCH 25, 1944**

SPLAWN, Commissioner, Dissenting:

In my judgment the decision of the majority on the evidence in these proceedings goes beyond our lawful power under Section 13(4). This view, I think, finds full support in several decisions by the Supreme Court of the United States in which the Court has had occasion to review some of our reports and orders under that section.

It should be emphasized that our authority under Section 13(4) to require increases in intrastate rates springs from and is an incident of the duty to regulate and protect interstate commerce. In exercising that power to nullify State authority we should be guided by the following wise and well-settled principles or standards which have been announced by the Supreme Court: (1) That this Commission has no general authority to regulate intrastate rates; (2) that the provision of Section 13(4) prohibiting unjust discrimination against interstate commerce is to be considered in connection with Section 15a; (3) that whenever the federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the federal power must clearly appear; and (4) that the mere existence of a disparity between rates on intrastate and interstate traffic does not warrant us in prescribing intrastate rates. *Florida vs. United States*, 282 U. S. 194, 211-212.

These proceedings present two questions. First, do the intrastate passenger fares imposed by authority of these States cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand? And second; do the intrastate fares cause any undue, unreasonable, or unjust discrimination against interstate commerce?

In considering the first question it is important to observe that the prohibition against undue prejudice and preference as between persons and localities in interstate and intrastate commerce in Section 13(4) is substantially the same as the prohibition against undue prejudice and preference contained in Section 3(1). The principal difference between the two provisions is that Section 3(1) prohibits a carrier from giving an undue preference or causing an undue prejudice, while Section 13(4) prohibits any intrastate rate, fare, etc., from causing the undue preference or undue prejudice. In view of the similarity of the language employed in the two provisions, we have said that evidence to sustain an order and finding that intrastate rates are violative of Section 13(4) in that they unduly prejudice persons or localities must be of equal dignity and probative value as the evidence required to sustain a finding under Section 3(1). *Barrett Co. vs. Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 334. The soundness of that rule is evident, for both provisions are directed against the same evils, namely, undue prejudice and undue preference as between localities and persons.

We have frequently found that the mere exist-

ence of a disparity in rates does not warrant a finding of undue prejudice and preference under Section 3(1), and that ordinarily the evidence to support such a finding must establish that such prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another. To say that the evidence necessary to sustain a violation of the provision of Section 13(4) as to undue prejudice and preference as between localities and persons, can be of less dignity or less probative value than the evidence necessary to show a violation of Section 3(1) ignores completely the principle that whenever the federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the federal power must clearly appear.

In support of their contention that the intrastate fares now maintained in these States cause undue prejudice and preference as between persons and localities, respondents rely upon (1) the similarity of the intrastate and interstate services, and (2) the differences in the fares.

The provision of Section 13(4) which deals with prejudice and preference as between persons and localities, as previously noted, corresponds to Section 3(1). Both of these provisions obviously are for the protection of persons and localities, and not primarily for the benefit of the carriers. The second provision of Section 13(4), which is discussed later herein, provides a complete remedy for the carriers in situations where intrastate rates, fares, etc., unlawfully discriminate against interstate commerce.

With respect to the situations in Kentucky and

Alabama, for example, no persons who pay the higher interstate fares and no localities are appearing herein to complain of undue prejudice and preference, or, without complaining, have testified that they are in any wise injured, and so far as these records disclose, none has complained to respondents. Under these circumstances we would not even have before us a complaint under Section 3(1), much less the evidence on which to base a finding of a violation of that section. Respondents do not ask relief for any particular persons or places, but seek state-wide orders.

In *Railroad Comm. of Wisconsin vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563, and *State of New York vs. United States*, 257 U. S. 591, the Court held that orders entered by this Commission under Section 13(4) requiring horizontal increases of intrastate passenger fares throughout the States of Wisconsin and New York, to correspond with fares for like interstate service in the same States, could not be sustained as orders to remove undue prejudice and preference as between persons and localities. In the *Wisconsin case*, at page 580, in referring to the "sweep" of our order the Court said:

It includes fares between all interior points, although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case the saving clause by which exceptions are permitted cannot give the order validity. As said by this Court in the

Illinois Central R. R. case [245 U. S. 493]: "It is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." See also *American Express Co. vs. Caldwell*, 243 U. S. 617, 627.

In this report it is stated that "The evidence in each of these proceedings, therefore, contrary to the situation dealt with in [the *Wisconsin case*] establishes a condition which is state-wide." "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States." Is it to be supposed that interstate passengers did not likewise ride on all trains to and from all branch and main-line points in Wisconsin? The cases are distinguishable, but in the following respect: In the *Wisconsin case* there was evidence that localities in Minnesota and Michigan in close proximity to localities in Wisconsin competed for the location of industries, and for retail trade, and to some extent for wholesale trade. This competition was affected by the lower State fares. In these cases there is no evidence whatever of competition or injury. The Court found that there was evidence which would support a finding of undue prejudice and preference against a large class of fares. As above indicated, objection to the Commission's order was that it was not restricted to the border points to which the evidence pertained, but that it included fares between all interior points, although they might not be near the border and the

fares between them might not work a discrimination against interstate travelers at all. To assume that the Court supposed that interstate passengers did not travel to and from the interior points, and to attempt to distinguish the cases upon that ground, is to miss the real point of distinction, which is that in the *Wisconsin case* there was evidence going beyond a mere showing of a difference in rates for similar services, and which tended to show injury to interstate localities, while the records herein are devoid of evidence of injury. If the order of the Commission there could not be sustained as an order to remove undue prejudice and preference as between persons and localities, what can be said in support of that phase of the state-wide orders herein which are unsupported by evidence beyond the mere difference in fares?

Turning now to the second question: Do the intrastate fares cause undue or unjust discrimination against interstate commerce? Here, respondents rely upon the loss of revenues which they contend has resulted from refusal of the State rate authorities to permit the intrastate fares to be increased to the interstate level. In Kentucky, for example, the estimated annual loss of revenue to all of the principal respondents in that State approximates \$526,000.

Section 15a, which is intended, among other things, to insure a fair return for carriers provides that in the exercise of our power to prescribe just and reasonable rates we shall give due consideration, among other factors, to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the

furnishing of such service, and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. In the *Wisconsin case*, at page 586, the Court referred to the "dovetail relation" between the provision of Section 13(4) relating to unjust discrimination against interstate commerce and the purpose of Section 15a, as it then stood, and pointed out that if that purpose is *interfered with* by a disparity of intrastate rates we are authorized to end the disparity by directly removing it. Continuing, at page 590 the Court stated that action by the Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce. It should be noted that at the time of the decision in the *Wisconsin case*, Section 15a did not read the same as at present, but its general purpose was to secure to the carriers revenue sufficient to enable them to provide in the public interest adequate and efficient transportation service, the same as under the present provisions.

That something more than a disparity between interstate and intrastate rates is necessary to support a finding of undue discrimination against interstate commerce is made quite plain in *United States vs. Louisiana*, 290 U. S. 70, 74, 75; wherein the Court stated:

By Section 416 of the Transportation Act, Section 13(4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This Court has consistently held that this section is to be

construed in the light of Section 15a(2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of Section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So construed, Section 13(4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Wisconsin Railroad Comm'n. vs. C., B. & Q. R. Co.*, *supra*, 586, 587, 588, 589, 590; *New York vs. United States*, 257 U. S. 591, 601; *Florida vs. United States*, *supra*, 211; *Louisiana vs. United States*, 284 U. S. 125, 131; see *Nashville, C. & St. L. Ry. Co. vs. Tennessee*, 262 U. S. 318.

In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive additional revenue, which would result from increasing the present intrastate fares to the interstate level, operates to *interfere with* or to *thwart* the broad purpose of Section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce.

In the Kentucky proceeding, for example, the relation of net railway operating income to investment in railway property including cash, materials, and supplies, for the seven principal respondents

shows average rates of return, after deduction of federal income taxes, as follows: 1938, 2.98 per cent; 1939, 3.76 per cent; 1940, 3.95 per cent; 1941, 5.41 per cent; 1942, 5.78 per cent. In this connection it is of interest that based on 1940 valuations recommended by our Bureau of Valuation the average rates of return for the respective years indicated would be 4.18 per cent, 5.31 per cent, 5.57 per cent, 7.81 per cent, 8.50 per cent, and 8.15 per cent. The increase in net railway operating income for passenger traffic alone, 1942 over 1911, was \$50,992,801 for the 12 Class I respondents in the Alabama proceeding, and \$29,506,275 for the seven principal respondents in the Kentucky proceeding.

I wish to emphasize my disagreement with finding five in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenue *required* to enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact, it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by Section 15a.

In each of these four States the State regulatory authority, after due consideration, authorized an

increase of 10 per cent on the going intrastate fares and declined to order or authorize a further increase to the interstate level. The fact that some of the adjoining States have permitted increases in intrastate fares to the interstate level is not binding upon the duly constituted authorities of these four States. The evidence in these proceedings does not sustain the contention that the maximum fares for interstate travel must also be the minimum fares for intrastate travel.

I am authorized to say that COMMISSIONERS AITCHISON and MAHAFFIE join in this expression.